Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

CYNTHIA DILLON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. (the "FMLA"), impose strict liability on an employer who "bent over backwards" to invite and evaluate an employee's claim for leave where:

(a) the District Court allowed the jury to consider evidence about the employee's qualification for FMLA leave even though the employer had no way of knowing about it while its decision was under advisement because the employee elected to withhold that information from the employer;

(b) the actual justifications for leave which the employee claimed while the employer's leave decision was under advisement are demonstrably false or otherwise insufficient as a matter of law; and

(c) the District Court instructed the jury to consider an alternative theory to justify the employee's leave which the employee had never claimed (and the employer had no way of knowing) before suit?

PARTIES TO THE PROCEEDINGS

Petitioner Maryland-National Capital Park and Planning Commission (the "Commission") is a public body corporate and agency of the State of Maryland. Respondent Cynthia Dillon ("Dillon") is an individual.

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PETITION FOR WRIT OF *CERTIORARI*

The Maryland-National Capital Park and Planning Commission respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *per curiam* panel opinion of the United States Court of Appeals for the Fourth Circuit was filed on December 11, 2007, affirming various trial court rulings. The opinion is published unofficially at 2007 WL 4322575 and reproduced at App. A. The Fourth Circuit denied a timely petition for rehearing on January 16, 2008. This opinion is reproduced at App. H. An opinion of the United States District Court for the District of Maryland issued at the pre-trial stage on August 18, 2005, is published as *Dillon v. The Maryland-National Capital Park and Planning Commission*, 382 F. Supp. 2d 777 (D.Md. 2005) and reproduced at App. G. A later opinion of the District Court issued on October 27, 2006, to deny certain post-trial motions is published unofficially at 2006 WL 5157076 and reproduced at App. D.

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit filed its panel decision on December 11, 2007, and denied a timely petition for rehearing on January 16, 2008. This honorable Court has jurisdiction over this petition filed timely under 28 U.S.C. § 1254 and in accordance with Supreme Court Rule 13.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions listed below are reproduced in the Appendix at I.

29 U.S.C. § 2601 the Family Medical Leave Act
29 U.S.C. § 2611
29 U.S.C. § 2612
29 U.S.C. § 2613
29 U.S.C. § 2617
29 C.F.R. § 825.116(a)
29 C.F.R. § 825.116(b)
29 C.F.R. § 825.208(a)(1) [renumbered 29 C.F.R. § 825.301]
29 C.F.R. § 825.302(a)
29 C.F.R. § 825.302(b)
29 C.F.R. § 825.303(a)
29 C.F.R. § 825.305
29 C.F.R. § 825.307

STATEMENT OF THE CASE

A. The Missing Work Week and Claim for Leave

On January 17, 2003, Patricia Barney signed a letter on behalf of the Commission, a public agency of the State of Maryland, to finalize Respondent Cynthia Dillon's dismissal from employment.

Barney was the Commission's Secretary-Treasurer and responsible for overseeing the finance department where Dillon worked in the office that handles the entire agency's payroll. In her letter, Barney noted that Dillon had been absent from the workplace without leave over the last full work week of 2002 –

the week ending between the Christmas and New Year holidays on Friday, December 27, 2002. (For the sake of convenient reference in this petition, that critical week is denominated as the "Missing Work Week.")

Before the dismissal, Dillon claimed that she was entitled to leave for the Missing Work Week because she was absent in order to attend to her grandmother who lived in Jamaica where she suffered a mild stroke on December 9, 2002. According to The Honorable Deborah K. Chasanow's summary judgment ruling that no liquidated damages would lie in this case, Barney "had a right to be skeptical" about Dillon's FMLA claim, but nevertheless "bent over backwards to give [respondent's claim for FMLA coverage] every consideration." 382 F. Supp. 2d at 792.

B. Reasons for Skepticism

Indeed, as the trial court indicated, Barney was aware of several reasons to be skeptical about Dillon's FMLA claim. First, Dillon made her request for leave to attend to her grandmother while she was vacationing in Jamaica with her family. According to Dillon, shortly after arriving to vacation in Jamaica with her family on December 12, 2002, she learned about her grandmother's health episode. Dillon waited until December 19, 2002 – the eve before her vacation leave would expire – before she requested the extra leave needed to cover the Missing Work Week.

Second, although it was the first request that she tied to caring for her grandmother, Dillon's December 19th request from Jamaica was actually the *third* time she applied for leave covering the Missing Work Week.

Well before she traveled to Jamaica for her family vacation, Dillon twice requested leave for the same week, but Barney and Dillon's supervisor were unwilling to extend Dillon's leave for a full three weeks because the year-end is particularly busy in the Commission's small payroll office. Instead, Barney offered Dillon the option of taking three weeks during another time of the year, or otherwise taking a two-week vacation that December. After Barney explained for a second time on November 7, 2002, why she would not approve three weeks of leave, Dillon applied for the two weeks in December that would not include the Missing Work Week, and which required her to return for work on December 23, 2002.

Third, Barney also knew from their second discussion on November 7, 2002, Dillon expressly threatened insubordination at one point by telling Barney that she would be absent for the Missing Work Week whether or not leave was approved. After Barney warned that her failure to report under those circumstances would result in dismissal, Dillon seemed to relent and applied for the two weeks in December which Barney promptly approved.

Finally, Barney had reason to be skeptical about Dillon's claim because Dillon told Barney months earlier that she made her travel arrangements and purchased all the airline tickets for her family *before* ever applying for the vacation leave. In their earlier discussions, Dillon expressed alarm that she would suffer financially unless Barney approved her leave for the Missing Work Week because the airlines would impose penalties if she made any changes to her travel itinerary.

C. Dillon's Explanation Before Petitioner's Decision: The Employee Notice

Notwithstanding a handful of palpable reasons for a jaundiced view of Dillon's third request for leave during the Missing Work Week, by the time Barney signed the letter on January 17, 2003, to deny the claim and fire her, Dillon had the benefit of no less than five unfettered opportunities to provide an adequate explanation of the basis for her request. Presumably, these five chances for Dillon to explain are collectively what led Judge Chasanow to decide that Petitioner "bent over backwards to give [respondent's claim for FMLA coverage] every consideration." 382 F. Supp. 2d at 792.

Dillon made her initial contact in an email sent to Barney on December 19, 2002, after normal work hours. Dillon states, in relevant part, "I am requesting an extension of sick leave because my grandma is very ill and I am in the process of finding a home for her." Barney answered Dillon's email the next morning in kind, and reminded her about their conversation during the previous month when they discussed the likely consequences of Dillon's failure to return to work on time. Barney closes by writing: "I am truly sorry that I cannot approved [sic] your request."

On December 23, 2002, the day she was due back to work in the payroll office, Dillon was still in Jamaica and responded with her second email to Barney. Among other things, Dillon claims for the first time in this email that her grandmother had "raised" her. Barney responded to Dillon by email almost immediately as follows:

> In our meeting you stated that you were going to take your requested annual leave even if it wasn't approved. I stated that you would be absent without leave and lose your job. I was very concerned. Subsequently, you agreed to the approved days. In that meeting you also stated that you were close to your grandmother, but at no time did you indicate that she had raised you. I believe that the Merit Rules provide for sick leave up to 80 hours for immediate family described as a spouse, a child or parents. I do not know if this could be applied to your grandmother, if she raised you and your parents did not. You may wish to contact the Personnel Office to determine that answer...

In her next communication to Barney some five days later, Dillon seems to hedge on whether her grandmother actually "raised" her, stating: "And yes I grew up with my grandmother."

Barney formally notified Dillon by letter dated January 3, 2003, that she intended to dismiss her from employment for several reasons relating to the fact that Dillon failed to return to work on December 23 as they discussed, and was therefore absent during the Missing Work Week without approved leave. In the letter, Barney provided Dillon another opportunity to justify her leave, and invites her to follow the Commission's FMLA evaluation procedures. The letter instructs as follows:

> [I]f you contend that your absence is covered for any reason under the Family and Medical Leave

> Act, you should submit all of the forms that I have enclosed. In this case you should also explain in reasonable detail whether and, if so, when and how your grandmother actually stood in the role of your parent during childhood.

Dillon eventually complied with Barney's request to provide the required forms, including a medical certification completed in Jamaica by a doctor who apparently treated her grandmother. According to the medical certification and the testimony adduced at trial by Dr. Sandra Nesbeth, Dillon's grandmother suffered a "TIA – known as a "Transient Ischemic Attack" or more simply a "small stroke." The certification further sets forth that Cynthia Dillon was needed to care for her grandmother in order "to find a caregiver" and "found a B. Ellis to look after her . . ."

Although Petitioner had no basis that was known at the time to contest whether Dillon's grandmother experienced a medical condition that could trigger coverage under the FMLA over the relevant time period, Petitioner was openly exploring whether her grandmother ever stood *in loco parentis* to the granddaughter, such that Dillon's absence from work to provide appropriate care would qualify for the entitlement to leave. Dillon replied to Barney on this score by stating, in pertinent part, as follows:

> I am the first grandchild for Ms. Lowe [her grandmother]. During my childhood my grandmother was always instrumental in my life. My mother was around but I was always with my grandmother... My grandmother fed me, take me to church on Saturdays, and comb

my hairs, as I stated she played a major role in my upbringing.

On January 10, 2003, Barney extended to Dillon a final opportunity to meet and discuss the pending decision about terminating the employment relationship. Once again, when Barney inquired, Dillon seemed to retreat even further from a parental-sort of relation, stating only that in her formative years "everyone helped everyone" and that "she was not trying to use FMLA," she just wanted to try to find another place for her grandmother and aunt to live.

During this meeting, Barney also attempted to confirm whether Dillon ever attempted to change her travel plans, which she needed to do in order to comply with the period of approved leave and report back to work on December 23, 2002. As Barney saw it, if Dillon had made no effort to comply with the leave actually approved, that failure would amount to insubordination in ignoring a reasonable and very clear directive. Dillon could never produce any evidence to show that she even attempted to change her travel plans before leaving for vacation.

D. Lower Court Proceedings

Dillon filed her complaint in the United States District Court for the District of Maryland on March 25, 2004, alleging that the Commission interfered with her entitlement to leave under the FMLA, that her termination was therefore unlawful, and demanded a jury trial. The parties filed cross-motions for summary judgment.

On August 18, 2005, Judge Chasanow denied Dillon's motion for summary judgment, but granted partial summary judgment in favor of the Commission to foreclose Dillon's recovery for liquidated damages only. On January 3, 2006, the Commission filed a motion in limine seeking to prevent the District Court from admitting certain evidence that Dillon failed to provide before January 17, 2003, the day Barney decided to terminate Dillon's employment. The District Court granted the Commission's motion in part, and denied it in part.

The parties tried the case before a jury between March 21 and 23, 2006. The Commission moved for judgment as a matter of law at the close of Dillon's case and after all the evidence was before the jury. On March 23, 2006, the jury returned a verdict in favor of Dillon and awarded $76,914.00, and on March 31, 2006, the District Court entered judgment.

On April 3, 2006, the Commission filed a second motion for judgment as a matter of law, motion for a new trial, and motion to alter or amend judgment. On October 27, 2006, the District Court issued an order denying the Commission's motion for judgment as a matter of law and motion for a new trial, and held the motion to alter or amend in abeyance.

After denying the Commission's motion for judgment as a matter of law and for new trial, on November 9, 2006, the District Court granted the Commission's motion to alter or amend judgment by reducing the former judgment of $76,914.00 in lost wages to $61,625.78. On November 30, 2006, the Commission filed its timely notice of appeal to the

United States Court of Appeals for the Fourth Circuit to challenge the trial court's denial of the Commission's motions for judgment as a matter of law and for new trial. On December 13, 2006, Dillon filed a timely notice of cross-appeal. The District Court entered a Final Amended Order on March 9, 2007, disposing of remaining issues at that Court by awarding attorneys' fees in the amount of $60,098.00, reducing the backpay award to $44,494.38 and awarding prejudgment interest of $6,742.77.

On December 11, 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court in an opinion that largely adopted the reasoning of the District Court. The Commission filed a Petition for Rehearing on December 26, 2007, which was denied on January 15, 2008, by order entered January 16, 2008.

REASONS FOR GRANTING THE PETITION

This case revolves around information that Dillon withheld from the Commission even as Barney was struggling diligently during January of 2003 to figure out whether Dillon qualified for FMLA leave. Although Judge Chasasnow seemed to correctly apprehend the evidentiary and substantive legal difficulties presented under these circumstances,[1] the

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[1] In the opinion granting partial summary judgment in favor of the Petitioner, Judge Chasanow highlights that "a potentially critical question in this case is whether Plaintiff may support her claim with evidence not shared with her employer." 382 F. Supp. 2d at 786.

District Court nevertheless allowed the jury to consider certain evidence that Dillon deliberately withheld from her employer, and the jury ultimately decided in her favor over the Commission's repeated objections. The error endorsed now by the Fourth Circuit is especially troubling because, as Judge Chasanow found, the Commission had "bent over backwards to give [respondent's claim for FMLA coverage] every consideration." 382 F. Supp. 2d at 792.

I. EVEN EMPLOYERS WHO "BEN[D] OVER BACKWARDS" FOR THEIR EMPLOYEES CANNOT COMPLY WITH THE FMLA IF THE FOURTH CIRCUIT ALLOWS JURIES TO CONSIDER NEW EVIDENCE OR ALTERNATIVE THEORIES ANNOUNCED ONLY AT TRIAL WHERE THE CLAIMANT-EMPLOYEE WITHHOLDS THE SAME INFORMATION FROM THE EMPLOYER BEFORE INITIATING SUIT.

A. The Importance of Being Noticed

Congress embedded a collection of mutual notice requirements into the statutory scheme of the FMLA and considered those requirements to be "extensive" when taken up on a collective basis. P.L. 103-3, Family and Medical Leave Act of 1993, H.R. Rep. No. 103-8(I), at 38-39; S. Rep. No. 103-3, at 25. *See* 29 U.S.C. § 2612(e). Likewise, notice requirements contained in the statute are also the lynchpin for a number of regulations promulgated by the Department of Labor to implement the FMLA. See 29 C.F.R. § 825.303(a) (Where need for leave is not foreseeable,

employee should give notice to employer as soon as practicable.); 29 C.F.R. § 825.302(a) (If 30 days notice is not practicable, notice must be given as soon as practicable); and 29 C.F.R. § 825.302(b) ("As soon as practicable" means as soon as both possible and practical; ordinarily requiring verbal notification in one or two business days.)[2] By enabling those requirements, Congress struck a critical balance between the employer's need for productivity and the employee's entitlement to leave. *See e.g.* P.L. 103-3, Family and Medical Leave Act of 1993, H.R. Rep. No. 103-8(I), at 87. (comment reported that "employee must give reasonable notice of their intent to take leave so as not to unduly disrupt an employer's operations").

But even with some sort of notice by the employee, an employer might still be unsure whether a request for leave is covered by FMLA. The statute accordingly empowers employers to solicit from employees a medical certification if, for example, that becomes necessary to evaluate whether a particular medical condition is covered, and the regulations even construct a rather elaborate procedure for resolving disputes over the content of various medical certifications. 29 U.S.C. § 2613(c) and (d); and 29 C.F.R. § 825.307. Congress recognized that employers

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[2] The Commission argued below that Dillon's notice was given untimely as a matter of law because she found out about her grandmother's health episode on December 12, 2002, the day she arrived for vacation in Jamaica. Dillon did not attempt to contact the Commission until a full week later, after the close of business on December 19, 2002, the eve of the last regular work day when her approved leave would expire.

would sometimes need to evaluate whether a particular medical situation qualifies for leave and sought to provide tools needed to make this evaluation successfully. Similarly, the Department of Labor regulations anticipate that employers might sometimes need to evaluate whether an employee has requested leave "in order to care for" another person who is covered by the FMLA, and these regulations entitle the employer to request information and documents toward that end. 29 C.F.R. § 825.305(a).

Congress also clearly intended for the FMLA to attach liability for an employer who believes – albeit mistakenly – that an employee does not qualify for leave. 29 U.S.C. § 2617(a)(1)(A)(iii). *See also generally* P.L. 103, Family and Medical Leave Act of 1993, S. Rep. No. 103-3, at 3. ("[I]f the employer proves to the satisfaction of the court that it acted in good faith and had reasonable grounds to believe that its acts or omissions were not a violation, the court may, in its discretion, limit the employer's liability to the actual damages.")

Meanwhile, a number of Circuit Courts have long held now that employers carry the affirmative obligation to inquire and evaluate whether an employee's request for leave is "possibly" covered by FMLA, even if the employee does not assert coverage or leaves it unclear at the time they make a request for leave. *See e.g. Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997) (employee provided employer with "sufficient information" about his medical condition to "put [the employer] on notice" of a "possible FMLA leave situation"); and *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995)

(notice by employee that leave was needed as a result of complications from toe surgery obligated employer to provide leave.)

The singular purpose of the FMLA's employee notice requirements described above, along with the employer's entitlement to relevant information about qualification and the legal obligation to solicit information to determine eligibility, is to afford the employer a reasonable opportunity to comply with the law. That purpose is confounded, however, unless employers are only legally responsible to "get it right" based on the information that is actually known, or otherwise should be known after exercising reasonable diligence, at the time when it makes a decision under FMLA. *Cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (ultimate purpose of private cause of action to enforce the Clean Water Act is to offer violators a constructive opportunity to comply with statutory requirements). Any other rule of law would make compliance with the statute more or less random, allowing employees to "mousetrap their employers by requesting FMLA leave on patently insufficient grounds and then after leave is denied obtaining a doctor's note that indicates sufficient ground existed, though they were never communicated to the employer." *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir. 2004). Congress could never have intended this result.

B. Missing Pieces: Information Dillon Withheld From Barney

1. Dillon Failed to Disclose She Was Born To An Unliberated Minor: Making Her Grandmother The Head of Household Who Stood *In Loco Parentis* During Dillon's Infancy.

Despite Barney's repeated entreaties seeking a complete understanding from Dillon about the relationship with her grandmother, Dillon withheld the full story until well after filing suit. While Barney was in the process of making her decision – when it really mattered – Dillon decided not to disclose that her mother was only 16 years old and not liberated from her grandmother's home in Jamaica when Dillon was born. Dillon's reasons for deciding to withhold those details from Barney may be worthy of great compassion and understandable on some level, but the Commission was absolutely *entitled* to have notice of that critical information before acting if it could later be used to support Dillon's claim that the Commission interfered with her qualification for leave. If Dillon chose to withhold that information from the Commission while its decision was pending, that evidence is irrelevant to support Dillon's claim at trial that the Commission interfered with her FMLA rights, and the trial court erred by admitting it.

Viewed according to its plain meaning, the FMLA does not apply when a granddaughter claims a need for leave in order to care for a grandparent – in Dillon's situation. Rather, as Barney pointed out when she invited Dillon to provide details about her

grandmother, the FMLA applies to these relationships only if the grandparent stood *in loco parentis* to the grandchild at an appropriate time, which then sweeps the grandparent into the statutory definition of a "parent." 29 U.S.C. § 2611(7) ("The term 'parent' means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter."). In short, Congress has imported into the FMLA a very fact-driven, common law threshold to determine whether Dillon's claim would be covered.[3]

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[3] For example, in a decision by the Sixth Circuit which the District Court cited in deciding the case below, the term "*in loco parentis*" is described as follows:

> [A]ccording to its generally accepted common law meaning, [the term] refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties... It clearly embodies more than furnishing material help to a close relative who is in need. One may be willing to furnish needed assistance to such a relative, even over an indefinite period of time, without being willing at the same time to assume the legal obligation of a parent. Due to the obligations and rights that arise out of such a relationship, the assumption of the relationship does not arise by chance, but is the result of intention.

382 F. Supp. 2d at 786, *citing Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir.1947), cert. denied, 331 U.S. 850, 67 S. Ct. 1730, 91 L. Ed. 1859 (1947) (internal citations omitted).

Precisely because each request under the FMLA requires an intense and fact-driven evaluation, sometimes involving very intimate personal affairs, it is fundamentally unfair to the employer for a trial court to allow an employee to tell their employer one story in order to qualify for the leave, tell a jury another story, and then hold the employer legally responsible based on the second story it never heard until litigation ensued. As the District Court correctly found, the Commission "gave [Dillon] repeated opportunities to clarify her relationship with her grandmother in order to demonstrate her entitlement to [FMLA leave]." 382 F. Supp. 2d at 792. The Fourth Circuit is in accord on this point, recognizing the "Commission considered the possibility that Dillon's request for leave constituted a request for FMLA leave and gave her several opportunities to clarify her relationship with her grandmother," leading the appeals court to conclude that "the Commission reasonably believed Dillon's leave did not qualify for FMLA protection." App. A., pg. 5.

But the District Court should have excluded as irrelevant any evidence about her relationship with her grandmother that Dillon possessed and withheld from the Commission, particularly since the Commission exercised diligence in its attempts to extract information that was readily available only to Dillon. The Fourth Circuit erred by affirming that fundamental unfairness in the proceedings below.

So the lower courts effectively gave Dillon free reign to tell the jury about how her grandmother functioned as head of the household during her infancy and at a time when Dillon's mother was still a minor.

Indeed, in her post-trial argument to support the jury's verdict on whether her grandmother stood *in loco parentis*, Dillon resorts almost exclusively to information that she chose to withhold from Barney while the Commission was mulling her claim. Specifically, in response to the Commission's renewed motion for judgment as a matter of law, Dillon argued:

> Plaintiff's mother was only 16 years old when she became pregnant.... The fact that Plaintiff briefly lived with her father when she was four years old for a year, and spent a couple if years living with her mother when she was attending high school does not change Plaintiff's grandmother role as her parent. The important undisputed fact it that is was the grandmother who actually raised her while Plaintiff's mother attempted to find work to assist with finances in the household. It was Plaintiff's grandmother who financially provided for her, gave her love and attention as she was growing up and spent more time with her then either one of the parents, and was there for her even when her own mother rejected her because of her early pregnancy.

Dillon's second story may be compelling, but she didn't tell it in time for the Commission to consider those facts in relation to her December 2002 leave request. Instead, while the Commission was trying to reckon whether and how the FMLA might fit her situation, Dillon offered Barney a variety of conflicting formulations to describe the nature of her relationship, none of which could possibly be taken to mean that her grandmother was the head of her household during

infancy or that her mother was a minor when Dillon was born. The relationship and activities Dillon disclosed before her termination are indicative of a typical of relationship between a grandchild and grandmother, but cannot make a case that her grandmother stood in place of her mother for the purpose of the FMLA. The District Court's decision to admit Dillon's second story was plainly in error and fundamentally unfair to the Commission because this lays exactly the sort of "mousetrap by notice" about which the Seventh Circuit worried in the *Aubuchon* case cited above.

2. Dillon's Medical Certification Was Demonstrably False Because No Need Existed For Her To Find "B. Ellis."

Beyond her failure to provide the whole story about relevant family relationships, the form that Dillon actually tendered to support her leave request fabricates a factual predicate indispensable for her FMLA request to survive. Specifically, before trial, Dillon's claim that she was entitled to leave rested entirely on the medical certification form written by Dr. Nesbeth which reports, in relevant part, that Dillon needed leave to care for her grandmother in order "to find a caregiver" and that she "found a B. Ellis to look after her . . . ." During trial, Dr. Nesbeth made it clear that she did not complete that portion of the form based on her personal knowledge. As a matter of law, if Dillon was not actually needed to find caregiver "B. Ellis" then, contrary to what the medical certification form reports, the whole basis of Dillon's claim for FMLA coverage would crumble.

Before Dillon filed suit in this case, and obviously before Barney decided on January 17, 2003, to dismiss her for insubordination, the Commission had no reason to question or challenge the content of Dr. Nesbeth's certificate. As it turns out, however, the Commission learned through discovery in this case that Dillon was not needed to find "B. Ellis" as a caregiver for her grandmother; that is, because "B. Ellis" is actually Berthlyn Ellis, Dillon's aunt and her grandmother's daughter. Dillon admits that Berthlyn Ellis lived with and cared for her grandmother both before her mild stroke and long after Dillon left Jamaica after the Missing Work Week. In other words, the medical certification does not support Dillon's entitlement to leave under the FMLA because the caregiver she claims to have "found" was already in place, so Dillon must identify some other basis in FMLA to sustain her claim otherwise.

Looking at these facts, the District Court concluded that a reasonable jury could have found that Dillon did not work any "deception" on Dr. Nesbeth with regard to the statements contained in the medical certification about finding "B. Ellis" as "caregiver." But whether Dillon set out to deceive Dr. Nesbeth is of no moment under the FMLA. The only thing that matters is what Dillon intended to communicate to her employer and, on this score, Dillon specifically accepted responsibility at trial for submitting the medical certification. Dillon herself submitted the medical certification form containing information which, for whatever reason, is clearly false and not based on Dr. Nesbeth's personal knowledge. The fact that this information is patently false eliminates the basis Dillon originally claimed to support her leave

request under FMLA because, contrary to what she claimed during January of 2003, no leave was necessary to "find" a caregiver who already existed.

C. Dillon's New FMLA Claim At Trial Was That She "Needed To Relieve" the Same Caregiver As The One She Originally Claimed That She "Needed To Find"

Dillon's desire to posture her claim on a "need to relieve" basis amounts to a maddening attempt to have it both ways. On the one hand, her claim before trial is based on a need to "find" a caregiver and, on the other hand, her new claim at trial is based on a need to "relieve" the very same person she claims to have later "found."[4] But neither the District Court nor the Fourth Circuit have elected to step in and prevent this manifest injustice. Instead, in an inestimable error,

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[4] Early on in this case, Dillon mentioned obliquely to Barney that she needed leave during the Missing Work Week in order to place her grandmother in an assisted living facility, but she ultimately abandoned that position during depositions taken under oath. 29 C.F.R. § 825.116(a)-(b) (leave needed "in order to care for" may include "situations where the employee may be needed to fill in for others who are caring for a family member or to make arrangements for changes in care, such as transfer to a nursing home.") Rather, Dillon testified that she merely wanted to find a better house for grandmother, even though her grandmother ultimately remained in the same household with her daughter, Berthlyn Ellis, for several years after Dillon's Missing Work Week in Jamaica. Thus, the only reason legally available to support her claim by the time trial began was that her leave was needed to find "B. Ellis" as a caregiver.

the District Court actually instructed the jury on the issue.

Perhaps because of the weakness so apparent in marshalling a claim based solely on her asserted need to "find" the very same aunt who was already a caregiver for her grandmother, Dillon took a brand new tack at trial in an effort to justify her claim for FMLA coverage for the Missing Work Week. Specifically, over the Commission's objections raised both *in limine* and at trial, Dillon was allowed to put evidence on that her leave was needed in order to relieve her aunt, Berthlyn Ellis, who had been providing care for her mother since the health episode at issue.[5] The lower court should never have permitted Dillon to introduce her "need to relieve" evidence because she did not make Barney aware of it before January 17, 2002 – while her FMLA leave decision was still under advisement. (Of course, the obvious irony is that Dillon could not possibly have provided that information to Barney because it would conflict squarely with the information contained in the medical certification form she submitted.)

The Commission objected to introducing any new evidence proffered by Dillon under a whole new theory that she needed "to relieve" Berthlyn Ellis. The trial court wrestled with the Commission's objection over a bench conference that included the following exchange:

---

[5] 29 C.F.R. § 825.116(a)-(b) (FMLA covers leave needed in order to care for qualified persons in "situations where the employee may be needed to fill in for others who are caring for a family member ...")

The Court

This is, in essence, a two-pronged case. The first part is she has to prove that she's [Dillon] eligible for the statute, that there's a medical problem that is the in loco parentis.

Even if you [Dillon] prove all of that, you've then got to prove she told the Commission enough so that the Commission can, you know, act upon it, and there's an instruction.

I think, that the Commission is judged on what they were told, and if the Commission doesn't know any of this, they can't be held liable.

This may go to whether a caregiver is needed, but it doesn't go – if the Commission doesn't get told this, you can't prove it. It can't be held responsible.

The Commission (Mr. Dickerson)

I am intending to argue it, but I just believe it's unfairly prejudicial for this kind of – to kind of leak into it because, I mean, by this theory, there could be a new theory today about why she was entitled to FML [sic] leave, and what would be the relevance of that?

The Court

I understand that position. There's not a lot of authority on this, so we're doing our best - -

The Commission (Mr. Dickerson)

I understand.

The Court

- - to try to work through this, and this dichotomy approach that we're using is what I decided based upon the reading of the case law that we have, and we're going to have specific findings on the jury verdict sheet on these elements.

Ultimately, the District Court instructed the jury to consider Dillon's trial-day theory – that her leave might qualify under FMLA in order "to relieve" her aunt – along with all the improper evidence offered and admitted during trial to support it. In denying the Commission's post-trial motion to challenge those rulings, the trial court reasons as follows:

> Jury Instruction No. 22, which defines the phrase, "needed to care for," provides the following guidance relevant to [the Commission's objections]:
>
> > The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member, ***or*** to make arrangements for changes in care, such as transfer to a nursing home.
>
> [The Commission] focuses exclusive (sic) on the first clause (where the employee may be needed

> to fill in for others who are caring the family member). Based on the evidence presented and this Court's instructions prohibiting the consideration of post-January 17, 2003 information, a reasonable jury could find Ms. Dillon was needed to care for her grandmother because she was making arrangements for changes in care (the second clause).

App. D, at page 54. (Emphasis in original).

The trial court's instruction to the jury is utterly improper because it mixes apples and oranges. No fair interpretation of the FMLA statute and regulations would allow a construction that elevates Dillon's desire to find a better home for her grandmother onto the same footing as "making arrangements for changes in care, such as transfer to a nursing home." App. D. *See* 29 C.F.R. § 825.116(b). Therefore, a reasonable jury cannot find that searching for a more comfortable home amounts to a "change in care" for a qualifying medical condition unless some claim or evidence is offered to make that connection. In this case, no connection is possible.

Even though the Commission expressly entreated the District Court to avoid an improper jury charge amounting to a "heads I win, tails you lose" choice, the Fourth Circuit declined to address this issue at all in either its *per curiam* opinion upholding the trial court or its decision to deny petitioner's request for rehearing. Dillon has been allowed in this case to whipsaw the Commission into liability, notwithstanding that Judge Chasanow believed the

Commission "bent over backwards" to consider her claim before making its decision under the FMLA.

II. THE UNLIMITED AND UNCERTAIN LEGAL OBLIGATIONS THE FOURTH CIRCUIT WOULD SADDLE ON EMPLOYERS UNDER FMLA IS AT ODDS WITH DUE PROCESS AND THE DECISIONS OF OTHER CIRCUITS.

Congress expressed its deliberate policy decision by enacting the FMLA to "balance the demands of the workplace with the needs of families," and by orienting the new statutory obligations "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). The statute simply cannot be stretched far enough to cover Dillon's claim for leave without running afoul of a "legitimate interest of employers" all over this Nation. Every employer has a compelling interest in preserving the opportunity to exercise due diligence in order to enjoy a fair chance of achieving compliance with their readily-known known legal and regulatory obligations. As the Eighth Circuit observed, an employer is not strictly liable any time it interferes with an employee's FMLA leave, but is only liable if that interference is unlawful. *See, e.g., Throneberry v. McGehee Desha County Hospital*, 403 F.3d 972, 981 (8th Cir. 2005).

Although a number of circuit court decisions do hold that an employer may be on "inquiry notice" that requires them to ask pertinent questions when an employee reasonably implies that leave is needed for an FMLA reason, the Commission can find no instance where a court holds the employer liable on the basis of an inquiry notice or interfering with an employee's

FMLA rights if the employee deliberately withholds from the employer or deliberately misleads the employer about the reasons leave is needed in the first place. *See Price,* 117 F.3d at 1026, and *Manuel*, 66 F.3d at 764, cited above.

To the contrary, in *Gay v. Gilman Paper Company*, 125 F.3d 1432 (11th Cir. 1997), employee Queen Ester Gay suffered a nervous breakdown that required her hospitalization and undoubtedly would have qualified as a medical condition that triggers an FMLA leave entitlement. Even though, at Gay's behest, her husband and sons informed the employer that she was in the hospital and undergoing tests, the Eleventh Circuit excused the employer from liability after the company fired Gay based upon her "extended failure to report off, or explain absences." The Circuit Court in *Gay* reasoned:

> [I]n [Gay's case for FMLA protection], not only was there a dearth of information provided [to the employer], but the information that was provided was false. Gay's husband informed her supervisor that Gay was having some tests run on the first day of her absence from work. When questioned by Gay's supervisor about his wife's condition, Gay's husband deliberately withheld information concerning the true nature of her condition and instructed his sons to do the same. Under these circumstances, the burden to request further information never shifted to [the employer] because [the employer] could not reasonably be expected to conclude that Gay's

> absence might have qualified for treatment under the FMLA.

Id., at 1436.

The compelling principle framed by the Eleventh Circuit in the *Gay* decision is that no employee can put an employer on inquiry notice under the FMLA if they deliberately withhold information or otherwise feed their employer with information that is false. The Fourth Circuit's decision in favor of Dillon is squarely at odds with that principle and this Court should step in to clarify.

The other circuits recognize comparable common sense limits on the employer's obligation after inquiry notice. For example, after Wal-Mart fired an employee who never gave a reasonably detailed notice concerning the pain in her side, the Fifth Circuit observed that "[w]hile an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant." *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980 (5th Cir. 1998), cert. denied, 525 U.S. 826, 119 S. Ct. 72, 142 L. Ed. 2d. 57 (1998), *quoting Johnson v. Primerica*, 1996 WL 34148, at 5 (S.D.N.Y. 1996). Likewise, the Seventh Circuit recognized the policy of fairness and balance in *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir. 2004), when it reasoned that the FMLA should not be read to encourage employees "to mousetrap their employers by requesting FMLA leave on patently insufficient grounds and then after leave is denied obtaining a doctor's note that indicates sufficient ground existed,

though they were never communicated to the employer."

The District Court on several occasions referred to the lack of developed case law interpreting the FMLA, particularly with regard to the procedural and substantive application of the statute and regulations. Like the District Court, every day employers must analyze similar issues and anticipate how they believe the previously described balancing of the statute will be interpreted. Without further guidance, employers like the Commission will be in the same position evaluating similar issues of entitlement to FMLA leave and what information can be used to satisfactorily demonstrate that entitlement.

In this case, the Fourth Circuit endorsed the District Court's charge holding the Commission accountable for not considering information that only Dillon enjoyed and after she decided to withhold it. Permitting reliance on this sort of information eviscerates the statutory requirement of sufficient notice and places employers in the untenable position of either having to grant leave not required by the known facts, or risking strict liability later because a trial court will not place limits on what facts are presented to a jury. Such an approach does not comply with the statute's stated purpose to carry out the Act "in a manner that accommodates the legitimate interest of employers."

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed December 11, 2007]

No. 06-2221

CYNTHIA DILLON,
Plaintiff - Appellee,

versus

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Defendant - Appellant.

No. 06-2309

CYNTHIA DILLON,
Plaintiff - Appellant,

versus

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Defendant - Appellee.

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
William Connelly, Magistrate Judge.
(8:04-CV-00994)

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Adrian Robert Gardner, General Counsel,
William C. Dickerson,
Riverdale, Maryland,
for Appellant/Cross-appellee.

Michael P. Deeds,
KESTELL & ASSOCIATES,
Washington, D.C.,
for Appellee/Cross- appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

These consolidated appeals arise from Cynthia Dillon's successful action against the Maryland-National Capital Park and Planning Commission ("Commission"), alleging that she was wrongfully terminated in violation of the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000) ("FMLA"). The Commission asserts that the district court erred when it denied its motions for judgment as a matter of law, as well as when it denied in part its motion in limine and overruled its evidentiary

objections to exclude Dillon's post-termination evidence regarding her qualification for FMLA protection. Dillon has cross-appealed and asserts that the district court erred when it granted, in part, the Commission's summary judgment motion and dismissed her liquidated damages claim, and when it reduced the jury's backpay award. Finding no error, we affirm.

We find that the district court,[1] in a thorough memorandum opinion explaining its denial of the Commission's renewed motion for judgment as a matter of law, properly determined that substantial evidence supported the jury's verdict in Dillon's favor. *See Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 543 (4th Cir. 2003). Moreover, because it was Dillon's burden to establish that her leave qualified for FMLA protection, *see Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 549 (4th Cir. 2006), the district court correctly found Dillon's post-termination evidence of which the Commission was unaware to be relevant under Fed. R. Evid. 401. The Commission's assertions to the contrary, we find that any prejudicial effect that this evidence may have had was significantly reduced by the district court's limiting instruction to the jury to consider the post-termination evidence only in the context of determining whether Dillon's leave qualified for FMLA protection, and not whether the Commission violated the Act. *See United States v. Love*, 134 F.3d 595, 603

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[1] The parties consented to the exercise of the district court's jurisdiction by a U.S. Magistrate Judge. *See* 28 U.S.C. § 636(c) (2000).

(4th Cir. 1998) (holding that we will not overturn a district court's Fed. R. Evid. 403 judgment "except under the most extraordinary of circumstances, where a trial court's discretion has been plainly abused") (internal brackets and quotation marks omitted); *United States v. Francisco*, 35 F.3d 116, 119 (4th Cir. 1994) ("We generally follow the presumption that the jury obeyed the limiting instructions of the district court").[2]

We also conclude that the district court did not abuse its discretion in granting the Commission summary judgment on Dillon's liquidated damages claim. *See Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 459-60 (4th Cir. 2007) (analogizing FMLA claims to Fair Labor Standards Act claims); *Mayhew v. Wells*, 125 F.3d 216, 218 (4th Cir. 1997) (holding that this court reviews the district court's denial of liquidated damages under the Fair Labor Standards Act for abuse of discretion). The record supports the district court's conclusion that the Commission considered the possibility that Dillon's request for leave constituted a request for FMLA leave and gave her several opportunities to clarify her relationship with her

---

[2] The Commission also summarily asserts that the district court erred in refusing to answer the jury's post-instruction question as to whether violating the Commission's merit rules constituted "insubordination." We find that the district court appropriately directed the jury to make its own determination by relying on the district court's jury instruction defining "insubordination." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.").

grandmother. Although the jury later found the Commission's determination that Dillon's leave was not FMLA-protected to be incorrect, the record establishes that the Commission reasonably believed Dillon's leave did not qualify for FMLA protection. Accordingly, we conclude that the district court did not abuse its discretion in denying Dillon's request for liquidated damages. *Cf. Roy v. County of Lexington, SC*, 141 F.3d 533, 548-49 (4th Cir. 1998) (upholding district court's denial of liquidated damages claim under the Fair Labor Standards Act where there was no evidence the defendant's actions were designed to circumvent the Act).

Last, we find that the district court did not err when it amended the judgment reducing Dillon's backpay award to reflect the evidence presented by Dillon. *State Farm Fire and Cas. Co. v. Barton*, 897 F.2d 729, 733 (4th Cir. 1990) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.") (internal quotation marks and citation omitted). Accordingly, we affirm the district court's final amended judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. WGC-04-994

[Filed March 9, 2007]

CYNTHIA DILLON,
Plaintiff,

v.

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Defendant.

FINAL AMENDED ORDER

In accordance with the foregoing Memorandum Opinion, IT IS, this 9th day of March, 2007, by the United States District Court for the District of Maryland, **ORDERED:**

1. That Defendant's Wage Memorandum, which the Court finds constitutes a Motion for Relief from Judgment, (Document No. 100), BE, and the same hereby IS, **GRANTED**;

2. That the judgment entered against Defendant in the Order of November 9, 2006 (Document No. 87) BE, and the same hereby IS, **AMENDED** to **$44,494.38**;

3. That Plaintiff's Motion to Amend the Judgment to Include Equitable Relief and for Attorney's Fees (Document No. 61), BE, and the same hereby IS, **GRANTED IN PART & DENIED IN PART**;

4. That Plaintiff is AWARDED **$6,742.77** as pre-judgment interest;

5. That the total judgment in favor of Plaintiff and against Defendant is **$51,237.15**;

6. That Plaintiff is AWARDED **$60,098.00** as attorney fees, divided as follows among the following attorneys: (a) **$5,913.00** to Ms. Karim, (b) **$18,600.00** to Mr. Deeds, and (c) **$35,585.00** to Mr. Kestell;

7. That Plaintiff is AWARDED **$401.13** as costs;

8. That the enforcement of this judgment is hereby **STAYED** pending resolution of the appeal before the United States Court of Appeals for the Fourth Circuit; and

9. That this Order shall be deemed to be a final judgment within the meaning of Federal Rule of Civil Procedure 58.

/s/

WILLIAM CONNELLY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. WGC-04-994

[Filed November 9, 2006]

CYNTHIA DILLON, Plaintiff,	)
v.	)
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, Defendant.	)

ORDER

In the Order of October 27, 2006 (Document No. 79), the Court held in abeyance Defendant's Motion to Alter or Amend Judgment[1] (Document No. 60), pending receipt of the parties' figures and computations of the total lost wages Ms. Dillon is entitled to receive, based on a 3.5% annual merit

[1] There is another pending motion, Plaintiff's Motion to Amend the Judgment to Include Equitable Relief and for Attorney's Fees (Document No. 61), which is not addressed in this Order.

increase, from January 17, 2003 to March 23, 2006. If Ms. Dillon had not been terminated by MNCPPC, Defendant projects Ms. Dillon would have earned $169,438.61. *See* Document No. 81, at 2. Deducting the amount ($107,812.83) Ms. Dillon earned from other employment during this time period, Defendant calculates Ms. Dillon's total compensation equals $61,625.78. *Id.* Plaintiff stipulates to Defendant's figures of $169.296.64[2] (gross earnings) and $61,625.78 (net earnings). *See* Document No. 85, at 1. "Plaintiff maintains her objection for the record that the figure should have included the 3.0% cost of living adjustment and that the jury was free not to deduct all interim earnings." *Id.*

Based on the parties' agreement that Ms. Dillon's total lost wages claim is $61,625.78, IT IS this 9th day of November, 2006:

ORDERED, that Defendant's Motion to Alter or Amend Judgment (Document No. 60) BE and the same hereby IS, **GRANTED**; and it is further

ORDERED that the jury verdict awarding $76,914.00 as lost wages to Plaintiff and against Defendant, a judgment entered against Defendant in the Order of March 31, 2006 (Document No. 57), BE and the same hereby IS, **AMENDED** to **$61,625.78**.

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[2] This is the amount Defendant claimed in its Combined Memorandum in Support of Defendant's Renewed Motion for Judgment as a Matter of Law, Motion for New Trial and Motion to Alter or Amend Judgment.

/s/

WILLIAM CONNELLEY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. WGC-04-994

[Filed October 27, 2006]

CYNTHIA DILLON
Plaintiff,

v.

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
Defendant.

MEMORANDUM OPINION

Pending before the Court and ready for resolution are Defendant The Maryland-National Capital Park and Planning Commission ("MNCPPC")'s Renewed Motion for Judgment as a Matter of Law (Document No. 58), Motion for a New Trial (Document No. 59), and Motion to Alter or Amend the Judgment (Document No. 60). Plaintiff Cynthia Dillon ("Ms. Dillon) filed an Opposition (Document No. 62) and Defendant MNCPPC a Combined Memorandum in Reply (Document No. 66). No hearing is deemed

necessary and the Court now rules pursuant to Local Rule 105.6 (D. Md. 2004).

BACKGROUND

On March 25, 2004, Plaintiff filed a Complaint alleging that Defendant terminated her in violation of the Family and Medical Leave Act ("FMLA"). In August 2002, Plaintiff requested but was denied three weeks of leave between December 12, 2002 and January 2, 2003. Her supervisors however authorized her to take leave for one week between December 12 and December 20, 2002. Plaintiff was supposed to return to work December 23, 2002. Plaintiff alleges, upon arriving in Jamaica, her grandmother was in a worse medical condition than Plaintiff had originally thought. On December 19, 2002, Plaintiff sent an e-mail to her supervisor requesting additional time to make arrangements for her grandmother. Plaintiff claims she never received a response from her supervisor. Plaintiff alleges, when she returned to work on December 31, 2002, her employer, MNCPPC, charged her with Absence Without Leave ("AWOL") for more than three days from December 23 to December 31, 2002, and that she was officially terminated. Plaintiff claims Defendant had advance notice of her need for leave to attend to her grandmother in Jamaica and that Defendant's denial of the FMLA leave request was pretextual and thus not in good faith.

On August 18, 2005, Judge Chasanow denied Plaintiff's Motion for Summary Judgment and denied in part and granted in part Defendant's Motion for Summary Judgment. Judgment was entered in favor

of Defendant and against Plaintiff as to Plaintiff's request for liquidated damages only. *See* Document No. 25.

This case was tied before a jury between March 21-23, 2006. On March 23, 2006, the jury returned a verdict in favor of Plaintiff. The jury found that Plaintiff proved by a preponderance of the evidence that Defendant unlawfully interfered with the exercise of a protected right under the FMLA by denying Plaintiff's requested leave. The jury further found that Defendant did not prove by the preponderance of the evidence that Plaintiff would have been terminated from her job not later than January 17, 2003 because she was insubordinate. The jury awarded $76,914.00 to Plaintiff as lost wages as a result of Defendant's violation of the FMLA. Finally, the jury found that Defendant did not prove by a preponderance of the evidence that Plaintiff failed to mitigate her damages. The jury did not subtract any amount from the award of $76,914.00. *See* Document No. 54. On March 31, 2006, the Court issued an Order of Judgment, entering judgment in favor of Plaintiff and against Defendant in the amount of $76,914.00. The Court reserved the right to rule on any appropriate motions for prejudgment interest and an award of attorney's fees and costs. *See* Document No. 57.

STANDARD OF REVIEW

A. Renewed Motion for Judgment as a Matter of Law

Defendant moved for motion of judgment as a matter of law at the close of Plaintiff's case and at the close of all evidence before the case was submitted to

the jury. These motions were denied. In accordance with Federal Rule of Civil Procedure 50(b), Defendant has renewed its motion post-trial. Defendant filed its post-trial motions three days after the Court issued the Order of Judgment in favor of Plaintiff, well within 10 days after entry of judgment. Fed. R. Civ. P. 50(b). Defendant has complied with all procedural requirements.

A court should not "disturb a jury verdict 'unless, without weighing the evidence or assessing witness credibility, [the court] conclude[s] that reasonable people could have returned a verdict' only for the moving party." *Randall* v. *Prince George's County, Md.*, 302 F.3d 188, 201 (4th Cir. 2002) (quoting *Cooper v. Dyke,* 814 F.2d 941, 944 (4th Cir. 1987)). "If a reasonable jury could reach only one conclusion based on the evidence or if the verdict in favor of the non-moving party would necessarily be based upon speculation and conjecture, judgment as a matter of law must be entered." *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir. 2005) (citing *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 160 (4th Cir. 1988)). However, "[i]f the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a motion for judgment as a matter of law should be denied." *Id.* at 489-90 (citing *Hofherr v. Dart Indus. Inc.*, 853 F.2d 259, 261-62 (4th Cir. 1988)). The Court must review the evidence and all reasonable inferences in the light most favorable to Plaintiff, the prevailing party at trial and the non-moving party in this dispute. In accordance with Federal Rule of Civil Procedure 50(b), since a verdict was returned, the Court may allow the judgment to

stand, order a new trial, or direct entry of judgment as a matter of law in favor of Defendant.

B. Motion for New Trial

Defendant timely moved for a new trial in accordance with Federal Rule of Civil Procedure 59(b). The Court has discretion to grant such a motion if the Court opines that "[1] the verdict is against the clear weight of the evidence, or [2] is based upon evidence which is false, or [3] will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996) (quoting *Aetna Casualty & Sur. Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941)). The decision to grant or deny a motion for a new trial rests within the sound discretion of this Court. *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994).

C. Motion to Alter or Amend Judgment

Defendant timely moved to alter or amend judgment in accordance with Federal Rule of Civil Procedure 59(e). "A district court has the discretion to grant a Rule 59(e) motion only in very narrow circumstances: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.'" *Hill* v. *Braxton*, 277 F.3d 701, 708 (4th Cir. 2002) (quoting *Collison v. International Chemical Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994)).

DISCUSSION

A. Renewed Motion for Judgment as a Matter of Law

Defendant renews its motion for judgment as a matter of law, contending the evidence presented during trial fell short as a matter of law that Plaintiff was entitled to FMLA leave, for the following reasons:

> (1) Ms. Dillon did not provide adequate notice under the statute; (2) Ms. Dillon did not prove her grandmother was her "parent" within the meaning of the act; (3) Ms. Dillon did not prove her leave request was "in order" to care for a "serious health condition[;]" (4) Ms. Dillon failed to provide sufficient proof that her grandmother suffered from a "serious health condition" within the meaning of the FMLA; (5) Ms. Dillon's FMLA rights were not unlawfully interfered with, but instead her employment was terminated for reasons discrete from the FMLA issue and Ms. Dillon failed to prove she would have otherwise remained employed so as to have sustained damages by reason of the so called violation; and (6) Ms. Dillon failed to prove the damages awarded with reasonable certainty.

Def.'s Combined Mem., at 5.

The Court addresses each alleged unproven qualification for FMLA leave below.

1. Providing Adequate Notice Per the Statute

Defendant claims, when Ms. Dillon arrived in Jamaica on December 12, 2002 and visited her grandmother, Ms. Dillon learned her grandmother had suffered a "small stroke." Ms. Dillon however did not contact her employer seeking an extension of time to care for her grandmother until December 19, 2002, a full week after learning of her grandmother's condition and one workday before Ms. Dillon's scheduled return to work. Defendant notes Ms. Dillon sent an e-mail on December 19, 2002 (after work hours), did not initiate any contact the following day, and waited until December 23, 2002 (the day she was scheduled to report to work) to call her office. Defendant claims Ms. Dillon's notice does not comply with timing requirements outlined in the FMLA regulation.

In her Opposition Plaintiff argues the jury could reasonably find Ms. Dillon's request met the standard for the timing and substance of the required notice. "The record shows that this notification was provided as soon [as] plaintiff recognized that she would need leave beyond the date of her scheduled return to work date on December 23. Therefore, she easily fit[s] within the notification requirement. of the regulations." Pl.'s Opp'n, at 13.

In its Reply Defendant reasserts Ms. Dillon's notice was untimely. "[I]t is uncontested she knew of the alleged qualifying condition the day she arrived and the record evidence does not support a jury finding in her favor on this issue." Def.'s Reply, at 4 (footnote omitted).

29 C.F.R. § 825.302(a) states, in pertinent part:

> An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If such 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

Neither side contends that Ms. Dillon's notice was untimely because it was not given 30 days in advance. Both agree, based on the facts of this case, the issue of Ms. Dillon's timeliness must be assessed based on the less than 30 days standard.

It is undisputed Ms. Dillon requested an extension of leave via e-mail on December 19, 2002. Below are pertinent portions of e-mail exchanges between Patricia Barney ("Ms. Barney"), MNCPPC's Secretary-Treasurer and Ms. Dillon's fifth level supervisor, and Ms. Dillon on December 23, 2002 and December 28, 2002 respectively.

> I am also concerned that you waited until the Thursday before the Monday you were due back and e-mailed me after 6:30 p.m. our time to notify me that you wanted an extension of time. You also did not read my response back to you Friday morning or try to contact me on Friday.

Pl.'s Ex. 8 (Ms. Barney's e-mail); Def.'s Ex. 1T (Ms. Barney's e-mail).

> Patti, my leave did not expired [sic] before I emailed you. I emailed you immediately as I realized that I was not getting through before my time. And yes, I grew up with my grandmother.
>
> I have been taking care of her ever since I got here, my vacation turned out to be sick time with her. I have make [sic] final arrangements for her and can be back in the office January 2, 2003.

Pl.'s Ex. 8 (Ms. Dillon's e-mail); Def.'s Ex. 1S (Ms. Dillon's e-mail).

At trial Ms. Dillon testified, upon finding her 81 year old grandmother in a very, very poor condition, she spent all of her free time taking care of and assisting her grandmother. *See* Tr. at 95:24 - 96:5 (March 21, 2006). Ms. Dillon explained why she did not contact her employer before December 19, 2002.

> I - - I was so caught up in trying to help my grandmother that the dates wasn't [sic] even - - I didn't realize the dates were getting close. So as soon as I realize the date, I went into town and informed my - - you know, get a[n] email service and inform my employers what was going on.

Tr. at 96:8 - 12 (March 21, 2006).

She repeated this response when questioned directly.

> Q: Was there any reason you waited until December 19th to inform your management about your request?
>
> A: No, absolutely not. I did not have a specific reason why I waited. Like I said, I was totally caught up in taking care of my grandmother, and actually, by the time I realize, it was the 19th already, and then I said, oh, I have to go into town.

Tr. at 1 17:12 - 18 (March 21, 2006).

Ms. Dillon testified that her grandmother lived in a home without running water or an indoor toilet. Because of her grandmother's frail condition, Ms. Dillon asked her mother-in-law if she (Ms. Dillon) could bring her grandmother to the house, because her mother-in-law's home had running water and an indoor toilet. Ms. Dillon's grandmother stayed with Ms. Dillon, at her mother-in-law's home, until a few days before Ms. Dillon departed Jamaica. Neither party disputes Ms. Dillon sought additional time, beyond her approved leave, to take care of her 81 year old grandmother.

The Court instructed the jury regarding the timing and adequacy of notice per Jury Instruction Nos. 25 and 26.

JURY INSTRUCTION NO. 25[1]

When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.

The phrase "appropriate notice" as used in these instructions means that the plaintiff must have notified defendant of her need for leave as soon as practicable after she learned of the need to take leave.

JURY INSTRUCTION NO. 26[2]

The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson

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[1] Sources: 1st paragraph: 29 C.F.R. § 825.303(a) [first two sentences]; 2d paragraph: *Sand, et al., Modern Federal Jury Instructions*, Instruction 88-135.

[2] Sources: 1st sentence - 29 C.F.R. § 825.302(c) [2d sentence - slightly modified]; 2d sentence - 29 C.F.R. § 825.303(b) [last sentence].

> will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

It is undisputed Ms. Dillon notified her employer by e-mail on December 19, 2002 of her need for leave, beyond her approved annual leave, to take care of her grandmother. It is further undisputed Ms. Dillon had to return to work on December 23, 2002. Based on her testimony that she was "caught up" caring for her grandmother and did not realize her approved leave was rapidly approaching an end until December 19th, prompting Ms. Dillon to send an e-mail to her employer requesting additional time to find suitable living quarters for her grandmother, a jury could reasonably conclude Ms. Dillon's need for leave did not arise until December 19th and that she notified her employer within one workday of the date scheduled to return to work in accordance with the FMLA regulation. In her e-mail Ms. Dillon did not expressly invoke FMLA, and was she required to mention FMLA. Defendant fails to demonstrate its entitlement to judgment as a matter of law on this issue.

2. *Proof that Grandmother Qualifies as a "Parent" Under FMLA*

Defendant claims, as of January 17, 2003 when it terminated Plaintiff's employment, Plaintiff failed to provide sufficient information that her grandmother qualified as a parent within the meaning of the FMLA, and therefore, Defendant is entitled to judgment as a matter of law. Defendant denies Ms. Dillon told her supervisors that her grandmother raised her before

the December 23, 2002 e-mail. When challenged by Ms. Barney, Defendant contends Ms. Dillon "retreated" and stated she grew up with her grandmother. In her FMLA package, Ms. Dillon further "retreated" by describing her grandmother as always instrumental in her life. Ms. Dillon described her grandmother feeding her, combing her hair, taking her to church and playing a major role in her upbringing. When Ms. Barney gave Ms. Dillon one last opportunity to define the nature of the relationship with her grandmother, Ms. Dillon added that in her community "everyone helped everyone." Defendant argues the information Ms. Dillon provided before her termination falls short of the legal relationship, in loco parentis, contemplated by the FMLA regulation.

In her Opposition Plaintiff relies on Judge Chasanow's memorandum opinion in which Judge Chasanow denied in part Defendant's motion for summary judgment. In that opinion Judge Chasanow wrote, "[the pre-termination] evidence is enough to create a triable issue as to whether [Ms. Dillon] was entitled to FMLA leave in order to care for her grandmother." *Dillon v. Maryland-Nat'l Capital Park & Planning Comm.*, 382 F. Supp. 2d 777, 786 (D. Md. 2005). Plaintiff argues, based on the definition of in loco parentis, she has presented sufficient evidence which could lead a reasonable jury to conclude a parent-child relationship existed between the grandmother and Ms. Dillon.

In its Reply Defendant contends Plaintiff improperly relies on post-termination evidence to demonstrate in loco parentis. Defendant argues the admission of post-termination evidence was

prejudicial. If only pre-termination evidence had been presented, Defendant claims a reasonable jury could only conclude that the relationship between Ms. Dillon and her grandmother did not satisfy the requirements of the FMLA, and thus, Defendant is entitled to judgment as a matter of law.

At trial Ms. Dillon testified that her mother was 16 years old when she gave birth to Ms. Dillon. When asked to explain the living arrangements at the time of her birth, Ms. Dillon answered:

> A: My grandmother actually raised me because my mother was young and, of course, inexperienced, and my grandmother took me almost instantly as her own because I was the first grandchild for her. And she raised me, fed me, take me to church and everything. Financially supports me. The whole works, as a mother would.
>
> Q: And I see from your letter you indicated that you actually even slept with her?
>
> A: Yes. In the same bed with her.

Tr. at 103:18 - 104:1 (March 21, 2006).

The information Ms. Dillon provided before her termination did not specifically mention that her mother was a teenager when she gave birth to Ms. Dillon, that Ms. Dillon's grandmother financially supported Ms. Dillon or that Ms. Dillon's grandmother basically performed all motherly functions by doing "everything." MNCPPC does not dispute Ms. Dillon's

claim that her grandmother raised her, though MNCPPC characterizes as a "retreat" Ms. Dillon's change in terminology *from* her grandmother raised her to she grew up with her grandmother. What is not disputed and is overall consistent with her trial testimony is a paragraph from Ms. Dillon's January 4, 2003 letter supporting her application for FMLA leave.

> I am the first grandchild for Ms. Lowe. During my childhood my grandmother was always instrumental in my life. My mother was around but I was always with my grandmother. I slept with her, always in a fight with my aunt to sleep directly [with] my grandmother as she always slept at the edge of the bed. My grandmother fed me, take me to church on Saturdays, and comb my hair[.] [A]s I stated she played a major role in my upbringing.

Pl.'s Ex. 10, at 1; Def.'s Ex. 7, at 1.

At the conclusion of trial, the jury was instructed not to consider evidence which was not provided to MNCPPC before January 17, 2003 in determining whether the MNCPPC interfered with any FMLA rights Plaintiff may have had. *See* Jury Instruction No. 34. The Court defined *parent* meaning a biological parent or an individual who stand or stood *in loco parentis*. *See* Jury Instruction No. 19. With Jury Instruction No. 20[3], the Court defined *in loco parentis*.

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[3] Sources: 1st paragraph - 29 C.F.R. § 825.113(c)(3); 2d - 3d paragraphs - *Dillon v. Maryland-National Capital Park & Planning Comm.*, 382 F. Supp. 2d 777, 786-87 (D. Md. 2005).

Persons who are *in loco parentis* include those with day-today responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

The term in *loco parentis* according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming parental status and discharging parental duties. The phrase *in loco parentis* is defined as in the place of the parent, charged with the parent[']s rights, duties and responsibilities. The mere fact of being a grandparent does not necessarily give rise to *in loco parentis* status. The key in determining whether the relationship of *in loco parentis* is established is found in the intention of the person allegedly *in loco parentis* to assume the status of a parent toward a child.

The intent to assume such parental status can be inferred from the acts of the parties. Other factors which are considered in determining whether *in loco parentis* status has been assumed are (1) the age of the child; (2) the degree to which the child is dependent on the person claiming to be standing *in loco parentis;* (3) the amount of support, if any provided; and

(4) the extent to which duties commonly associated with parenthood are exercised.

Excluding the post-termination information presented at trial and relying solely on the pre-termination information, there is sufficient evidence for a reasonable jury to conclude Ms. Dillon's grandmother assumed *in loco parentis* status. In addition to stating that her grandmother raised her, Ms. Dillon's January 4, 2003 letter reveals that her grandmother, in essence, had day-to-day responsibilities. Ms. Dillon notes her mother was around, but she discloses she was always with her grandmother. Ms. Dillon describes her grandmother as being instrumental in her life and playing a major role in her upbringing. A reasonable jury could infer that Ms. Dillon was very dependent as a child upon her grandmother. A reasonable jury could also infer that the grandmother stood in *loco parentis* to her granddaughter. Contrary to Defendant's assertion, the evidence does not suggest only one conclusion — Ms. Dillon's grandmother was not a qualified parent within the meaning of the FMLA. Defendant fails to demonstrate its entitlement to judgment as a matter of law on this issue.[4]

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[4] As discussed in the March 3, 2006 Memorandum Opinion (Document No. 44), the Court permitted post-termination information about Ms. Dillon's grandmother. This decision was based on the Court's review of FMLA cases where post-termination medical evidence was deemed admissible. "If post-termination medical evidence is relevant to whether an employee had a serious health condition at the time of his termination, *see Frazier* v. *IBP, Inc.* No. C97-0023, 1999 WL 33655745 (N.D. Iowa Feb. 2, 1999)], by analogy, post-termination

3. *Proof that Grandmother Suffered a "Serious Health Condition*

Defendant next argues that it is entitled to judgment as a matter of law because Plaintiff failed to prove her grandmother had a serious health condition. Defendant summarizes Dr. Nesbeth's testimony about the condition of Ms. Lowe, Plaintiff's grandmother, as follows:

> ([1]) it was not serious enough for her to be hospitalized; (2) Ms. Lowe suffered a TLA, or a "small stroke" [;] (3) Ms. Lowe was given a medical injection to bring her blood pressure down and left the hospital the same day she was brought in; (4) an aide was sent to Ms. Lowe the next two days to check her blood pressure which was within normal levels; (5) the doctor told Ms. Lowe to take aspirin every day; (6) Ms. Lowe did not have high blood pressure; (7) Dr. Nesbeth's testimony focused not on the seriousness of the then- existing condition, but rather that the condition might be a signal of a serious condition to come down the road; and (8)

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evidence is relevant to whether Ms. Dillon was qualified to take FMLA leave to care for her grandmother at the time the Commission fired Ms. Dillon." Document No. 44, at 7. Ms. Dillon was not seeking to present *new* information, such as her grandmother was actually her mother and thus a qualified family member under FMLA. Such information would not be admissible because Ms. Dillon did not provide notice to her employer before termination.

> Ms. Lowe did not return to see the doctor until 19 days later, on December 28th for a check-up.

Def's Combined Mem., at 19.

Based on Dr. Nesbeth's testimony, Ms. Lowe's "small stroke" does not qualify as a "serious health condition" as defined by the Court in Jury Instruction No. 23. First, Plaintiff did not demonstrate Ms. Lowe was incapacitated for more than three consecutive days. Second, Plaintiff did not demonstrate Ms. Lowe was under the continuing treatment of a physician. According to Defendant, the aide dispatched by Dr. Nesbeth's to check Ms. Lowe's blood pressure on two consecutive days does not constitute "continuing treatment of a physician." Moreover, Dr. Nesbeth's instruction that Ms. Lowe take an aspirin daily, vice prescription medication, is insufficient to constitute continuing treatment by a physician. Finally, Dr. Nesbeth determined Ms. Lowe experienced a TIA[5] or a small stroke. The FMLA regulation lists examples of serious health conditions. A "severe stroke" qualifies as a serious health condition. A small stroke suffered by Ms. Lowe does not. *See* Def.'s Combined Mem., at 22. Defendant asks for judgment as a matter of law on this issue.

In her Opposition Plaintiff argues a reasonable jury could find that Ms. Lowe had a serious health condition. First, on the *Certification of Health Care Provider ("Certification"),* Dr. Nesbeth opined Ms. Lowe would be incapacitated two to three weeks due to

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[5] Transient Ischemic Attack.

the TIA on December 9, 2002. This assessment satisfies the more than three consecutive calendar days of incapacity as required by the FMLA regulation. Second, at trial, Dr. Nesbeth explained, that due to Ms. Lowe's age (81 years old), a TIA was far more serious than for someone much younger. "Indeed the two to three week period after the stroke was critical because if she had another stroke during that period it would possibly be fatal — thus, the reason why she was incapacitated for that length of time." Pl.'s Opp'n, at 18 (footnote omitted). Third, Ms. Lowe's condition required substantially more than the amount of medical care to qualify as a "serious health condition" per the regulation. "In regard to this issue the evidence reflected that her grandmother required at least two visits to the doctor and at least two *or* three more visits from the doctor's assistants for monitoring and/or therapy. Thus, the grandmother's condition easily fit[s] with the regulation's definition of 'serious health condition' in this case." *Id.* at 19 (footnote omitted).

In its Reply Defendant claims Plaintiff has embellished Dr. Nesbeth's testimony and the contents of the *Certification.*

> Nowhere did Dr. Nesbeth ever indicate Ms. Lowe would be incapacitated, let alone for 2-3 weeks as asserted. Dr. Nesbeth testified that if Ms. Lowe sustained another stroke then it could be more serious. Dr. Nesbeth's testimony focused not on any severity of Ms. Lowe's then current condition, but later on the prospect that a stroke could come down the road. This testimony does not demonstrate an existing

> serious health condition. The 2-3 weeks referenced in the Medical Certification Form referred to the time needed by Ms. Dillon, not Ms. Lowe.

Def.'s Reply, at 7-8 (footnote omitted).

Defendant asserts Plaintiff has not demonstrated either incapacity or continuing treatment. Plaintiff did not present any evidence at trial that Ms. Lowe could not perform her regular daily activities after suffering the TIA. Evidence of continuing treatment is lacking. The assistant dispatched by Dr. Nesbeth to assess Ms. Lowe's blood pressure, who Defendant equates to an aide or tech, is not a nurse or Physician's Assistant as contemplated by the regulation and these visits by Dr. Nesbeth's "aide" do not meet the regulation's requirements of continuing treatment. As a matter of law Plaintiff has not proven her grandmother had a serious health condition.

At trial Dr. Nesbeth testified that she saw Ms. Lowe on December 9, 2002. Ms. Lowe complained of dizziness. She was trembling. The attendant with Ms. Lowe reported Ms. Lowe had blacked out, meaning when people spoke with Ms. Lowe, she did not respond and only stared back at them. Upon examination Dr. Nesbeth found Ms. Lowe dizzy and trembling. Dr. Nesbeth noted Ms. Lowe's blood pressure was very high. When asked questions, Ms. Lowe's response' time was slow and she seemed a little confused. Dr. Nesbeth diagnosed TIA. She administered an injection for Ms. Lowe's high blood pressure and she sent Ms. Lowe home on coated aspirin, standard treatment to prevent a stroke. Tr. at 45:5 - 46:5 (March 21, 2006).

Next, Dr. Nesbeth described the continuing or follow-up treatment:

Q: And did you continue to observe and treat Ms. Lowe?

A: Yes. Usual treatment is to observe because you do not want a patient to get a stroke, a cerebral accident attack, so I sent a trainee from the office the following day - - because of her condition, I didn't want her to come out, so since it wasn't serious in the sense where she had to be hospitalized, she just had to be monitored by home care and home attendants, I sent an assistant from the office to do her blood pressure. It was normal. It was 120 over 80. And she - - the assistant was sent back the following day to make sure.

The reason for this is because one high blood pressure reading doesn't make you a hypertensive or a high blood pressure patient. You need three consecutive readings of high readings. So the other two were normal, so I recognized that the high blood pressure reading was because she had the TIA.

She was contained on conservative management. The most important thing was just to monitor her care and to see that she got her medication and her daily needs were attended to.

Q: Okay. Did you continue to monitor - -

A: We did. I saw her on the 28th of December.

Q: Okay. 28th of December, that's roughly two and a half weeks later?

A: Nine from 28, that's what - - 17, 18, 19, 19 days, yes.

Q: Nineteen days later. And how did you find her at that time?

A: She was much better. Still a little slow, but the pressure was normal. She was more responsive but was a little lethargic mentally, slow and still trembling.

Q: Okay. And at some point in January of 2003, roughly a week later after you treated her on December 28th, did you have an occasion to treat her again or see her again?

A: I saw her on the 8th of the first - - 8th of January, 2003.

Q: And what did you find her condition to be at that time?

A: She was much improved. She only had a little bladder infection.

Tr. at 46:14 - 48:2 (March 21, 2006).

Dr. Nesbeth explained why it was important to closely monitor Ms. Lowe after she suffered a TIA on December 9th.

A: [A] TIA, transient ischemic attack, is the initial warning, so to speak, of a stroke. A cerebral vascular accident it is medically called, but commonly known as a stroke.

You monitor it to make sure that there's no repeat because chances are if she gets another TIA, then the next one she gets will be fatal, so you usually monitor and follow up the patient during the sensitive period. And that was why it was important that someone was there to make sure that she was okay, she wasn't confused, she didn't fall again or stumble or anything like that.

Tr. at 55:10 - 20 (March 21, 2006).

On cross-examination Dr. Nesbeth was questioned about the *Certification.*

Q: Now, under 5B, will it be necessary for the employee to take work only intermittently or to work a less than full schedule as a result of the condition, including for treatment described in Item 6 below? You put?

A: Yes.

Q: You indicated, yes.

If yes, give the probable duration. Can you read what you wrote there?

A: I wrote two to three weeks her granddaughter will need to look after her and

find a caregiver to monitor her needs since she's 81.

Q: When you're saying she - - since she's 81, are you referring to Ms. Lowe?

A: Elvira Lowe.

Q: Who's 81 years old?

A: Who is [81] years old.

Q: Okay. Then under 6A, if additional treatments will be required for the condition, provide an estimate of the probable number of such treatments.

You put an entry in?

A: I put forever. Monthly for life.

Q: Turning to the next page of the Family Leave Act form, which is Bates stamped 0005, I notice that the first entry you give is under 8A?

A: Correct.

Q: If leave is required to care for a family member of an employee with a serious health condition, does the patient require assistance for basic medical, personal needs or safety or for transportation? What did you insert?

A: I wrote yes.

> Q: Then under C, you have an entry, if the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need.
>
> A: Two to three weeks.

Tr. at 59:22 - 61:5 (March 21, 2006).

Dr. Nesbeth was questioned about the significance, if any, of Ms. Lowe's age.

> Q: Now, you had indicated that Ms. Lowe needed care because she was 81. Was that because she was 81 or because she was 81 and had the TIA?
>
> A: Eighty-one and had a TIA. She - - she was 81 before the TIA, so it had no relevance.
>
> Q: In your opinion, would she have needed care with or without the TIA?
>
> A: No, not the quality care she would have needed with the TIA, because, remember, she was trembling and confused with the TIA.

Tr. at 63:19 - 64:3 (March 21, 2006).

The Court defined "serious health condition" in Jury Instruction No. 23[6] as follows:

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[6] Sources: 1st paragraph - *Sand, et al., Modern Federal Jury Instructions,* Instruction 88-131; 2d - 4th paragraphs - 29 C.F.R.

A "serious health condition" means an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital, hospice, or residential medical care facility, or 2) continuing treatment by a health care provider.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) A period of incapacity (that is, an inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (for example, a physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in

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§ 825.114(a)(2) - (a)(20(i)(B); 5th - 8th paragraphs - 29 C.F.R. § 825.114(a)(2)(iii) - (a)(2)(iii)(C).

> a regimen of continuing treatment under the supervision of the health care provider.
>
> (B) Any period of incapacity or treatment for such incapacity due to chronic serious health condition. A chronic serious health condition is one which:
>
> > (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
> >
> > (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
> >
> > (3) May cause episodic rather than a continuing period of incapacity (for example, asthma, diabetes, epilepsy, etc.).

Based on Dr. Nesbeth's testimony and the above instruction, the Court finds a reasonable jury could find Plaintiff's grandmother, Ms. Lowe, had a serious health condition. Jurors could reasonably infer from Dr. Nesbeth's testimony that Ms. Lowe's age of 81 years coupled with suffering the TIA qualifies as a serious health condition. It is undisputed that Dr. Nesbeth saw Ms. Lowe on December 9th and that an assistant of Dr. Nesbeth visited Ms. Lowe on December 10th and 11th to check Ms. Lowe's blood pressure. These three visits would meet the period of incapacity standard regarding "treatment two or more

times by a health a health care provider." The parties quibble about whether this assistant is an aide or tech. In its Reply Defendant asserts, "Plaintiff. . . glosses over a critical distinction and relegates its treatment to a footnote; this time the distinction between a nurse or Physician's Assistant and the tech who took Ms. Lowe's blood pressure reading on two occasions. Plaintiff ignores the obvious and wide chasm between the credentials and treatment authority of a Physician's Assistant as opposed to an aide or tech." Def.'s Reply, at 9. Neither party questioned Dr. Nesbeth about the assistant's medical or nursing credentials. Defendant could have demonstrated Dr. Nesbeth's assistant was not qualified during cross-examination, but did not. The parties' arguments that this assistant either does or does not qualify is pure speculation. It is undisputed that this assistant was "under the direct supervision of" Dr. Nesbeth, a health care provider, since Dr. Nesbeth instructed the assistant to visit Ms. Lowe and measure her blood pressure. The jurors could reasonably infer this assistant was a "Physician's Assistant" as mentioned in Jury Instruction No. 23.

Defendant argues Plaintiff did not demonstrate that Ms. Lowe was incapacitated. During trial Dr. Nesbeth was questioned extensively about the *Certification*. When Dr. Nesbeth filled out the *Certification*, she unequivocally stated that Ms. Lowe required assistance for basic medical, personal needs or safety or for transportation. *See* Tr. at 60:22 - 61:1 (March 21, 2006). Dr. Nesbeth's affirmative response is easily readable on the form. This *Certification* was submitted to the MNCPPC *before* January 17, 2003. Based on Dr. Nesbeth's medial assessment of Ms.

Lowe, a patient Dr. Nesbeth has been treating since 1997, *see* Tr. at 45:25 - 46:1 (March 21, 2006), a reasonable jury could conclude Ms. Lowe was incapacitated for a period of time after suffering the TIA. Defendant fails to demonstrate its entitlement to judgment as a matter of law on this issue.

4. Leave Request "In Order to Care for" a "Serious Health Condition"

Even if the Court finds Plaintiff's grandmother had a serious health condition, Defendant argues Plaintiff fails to demonstrate that her request for extended leave, beyond her approved annual leave of December 12th - 20th, was made in order to care for her grandmother. Defendant concedes Plaintiff did not learn of her grandmother's illness until her arrival in Jamaica December 12, 2002. It is uncontested Ms. Lowe suffered the stroke three days before on December 9th. Defendant claims Ms. Lowe has two daughters who shared responsibilities as caretakers. Ms. Carmelita Lowe always took her mother to medical appointments. Ms. Berthlyn Ellis lived with her mother. "During her time in Jamaica, Ms. Dillon never accompanied her grandmother to a doctor's appointment while Ms. Lowe's daughters took her to one appointment with Dr. Nesbeth and another with a different clinical Doctor." Def.'s Combined Mem., at 27. Defendant asserts Plaintiff's request for leave, at most, was to obtain better living accommodations for her grandmother. Though laudable, this is not sufficient under the FMLA regulation. Plaintiff presented no evidence of attempting to secure an assisted living facility per the regulation. "Ms. Dillon returned to Maryland on the date she originally

planned and did so without securing either an assisted living arrangement or a new house (which her aunt had allegedly identified) for her grandmother and aunt." *Id.* at 28. Defendant asserts Plaintiff presented false information to MNCPPC to justify her leave request. *See id.* at 24 n.7. The evidence clearly shows Plaintiff failed, as a matter of law, to demonstrate the request for leave was "in order to care for" her grandmother.

In her Opposition Plaintiff characterizes the FMLA regulation as very liberal and expansive in defining situations in which an employee is needed to care for a family member with a serious health condition. She asserts she was needed to care for her grandmother for reasons consistent with the regulation. First, she needed to find better living accommodations for her grandmother post-stroke. "Specifically, plaintiff needed to find a place with *inter alia* indoor plumbing so that it was safe for her grandmother to use the bathroom and to walk about. A reasonable jury could find that plaintiff was taking care of her grandmother's hyg[i]enic and safety needs which the grandmother was unable to do on her own." Pl.'s Opp'n, at 20. Second, a reasonable jury could find, since the grandmother was incapacitated, Plaintiff needed to provide physical, psychological, medical and hygienic care. Third, even though the grandmother had another caretaker, a reasonable jury could find Plaintiff needed to fill in for others in taking care of her grandmother or to make arrangements for changes in her grandmother's care. Regarding Defendant's insinuation that Plaintiff lied about her grandmother's need for care, "such credibility decisions were the province of the jury and defendant's desire that the

jury come out the other way is not sufficient for overturning the verdict." *Id.* at 21 (footnote omitted).

In its Reply Defendant asserts Plaintiff failed to meaningfully address Defendant's argument that Plaintiff lacked evidence supporting her need to care for her grandmother. No evidence supports the claim of safety and hygienic needs. "Plaintiff now admits her grandmother had another caretaker, but again asserts (without the benefit of record evidence) that she was needed to fill in for the caretaker. However, this is at odds with both her communications with the workplace in the relevant time period and her Medical Certification Form." Def.'s Reply, at 10. Defendant reiterates that Plaintiff was deceptive which MNCPPC about the caregiver's status, information that Plaintiff supplied to Dr. Nesbeth and submitted in support of her FMLA application. For all these reasons Plaintiff has failed to prove her leave request was in order to care for her grandmother. Defendant is entitled to judgment as a matter of law.

The Court first addresses the issue of Ms. Dillon's alleged deception. "The reason provided to her employer in her FMLA application was finding a "B. Ellis" to care for her grandmother. Not only was that statement false and misleading, it is patently inconsistent with a suggestion that the reason for the leave was to provide relief for Ms. Ellis so that she could go to work." Def.'s Combined Mem., at 24 n. 7. Plaintiff rejects such allegations. This issue, whether Ms. Dillon was or was not deceptive, is an issue of fact and of credibility. Before deliberations the jury was instructed, "you and only you are the judges of the facts," Jury Instruction No. 1, and "[y]ou are the sole

judges of whether testimony should be believed[,]" Jury Instruction No. 10. During the trial Defendant's counsel elicited testimony from Dr. Nesbeth regarding "B. Ellis."

> Q: That last phrase, "And found B. Ellis to look after her," meaning Ms. Lowe?
>
> A: Granddaughter came and looked after her.
>
> Q: Um hum.
>
> A: Looked after her and found B. Ellis to look after her.
>
> Q: Now, you don't know who B. Ellis is?
>
> A: No. B. Ellis is Berthlyn Ellis. I knew her on the 8th of January when she brought back Ms. Elvira Lowe.
>
> Q: Would it surprise you to know that Berthlyn Ellis is Ms. Lowe's daughter who lived with her both before and after this incident?
>
> A: I wouldn't know.

Tr. at 66:25 - 67:11 (March 21, 2006).

In its Reply Defendant asserts, "Dr. Nesbeth testified she got the information [about "B. Ellis"] from Ms. Dillon." Def.'s Reply, at 11. Dr. Nesbeth did not affirmatively testify as such but a reasonable jury could infer Dr. Nesbeth obtained the information from Ms. Dillon. Defendant's counsel had an opportunity to

cross-examine Plaintiff about this alleged deception but for reasons unknown did not. In closing argument, Defendant's counsel suggested Ms. Dillon's "sandbagged" Dr. Nesbeth. *See* Tr. at 163:24 - 164:6 (March 22, 2006). That is the only allusion to this deception regarding "B. Ellis." Based on this record, a reasonable jury could find that Ms. Dillon was *not* false and misleading with MNCPPC regarding the need to relieve "B. Ellis" so she could work. Such a factual finding is within the sole province of the jury.

The Court now turns to whether Plaintiff demonstrated she needed leave in order to care for her grandmother. Before deliberations the jury was instructed as follows:

> An employee is "needed to care for" a spouse, son, daughter or parent with a serious health condition when the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety; or is unable to transport himself or herself to the doctor. The phrase also includes providing psychological comfort and reassurance which would be beneficial to a family member with a serious health condition who is receiving inpatient or home care. The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

Jury Instruction No. 22.[7]

Assuming the jury followed Jury Instruction No. 34 and considered only evidence provided to MNCPPC as of January 17, 2003, a reasonable jury could find Ms. Dillon presented evidence demonstrating her need for leave to care for her grandmother. On December 19, 2002, Ms. Dillon sent to Ms. Barney an e-mail from Jamaica, which states in pertinent part:

> I am requesting an extension of sick leave because my grandma is very ill and I am in the process of finding a home for her. The time is very limited and the process is very slow. I will greatly appreciate this extension. Please let me know by email. Thank you.

Pl.'s Ex. 7 (CD00044); Def.'s Ex. 1W.

Upon receiving Ms. Barney's response, which expressed sympathy, denied the request for extended leave and warned of termination if absent without leave, Ms. Dillon wrote the following response on December 23, 2002:

> Patti, I honestly cannot recall that I would be terminated. Based on your response, I am supposing the merit rules does [sic] not deal with sick leave for grandparents, my grandmother actually raised me, I feel the need to find her a safe home.

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[7] Source: Sand, et al., *Modern Federal Jury Instruction*, Instruction 88-130.

> When I came I had no idea the condition my grandmother was in. I see the need to find a home for my grandmother and I am trying to place her in a home, and I am plea[d]ing to your compassion to give me the chance to place my grandmother in a home. I am going around checking out places before the holidays, that was my goal to get her in the home before the holidays, I am not successful as of yet, I have some places [I'm] looking at today.
>
> If you cannot grant me the request for sick leave to take care of my grandmother, it is possible to check with Trudye Johnson, if the merit rules covers [sic] me for this sick leave extension of time to take care of grandmother.

Pl.'s Ex. 8 (CD00158); Def.'s Ex. 1U.

A need to care for a parent with a serious health condition includes "situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home." Jury Inst. No. 22. A transfer to a nursing home is illustrative of making arrangements for changes in care, demonstrated by the words "such as." The "home" Ms. Dillon seeks to find for her grandmother is ***not defined*** in these e-mails. A reasonable jury could infer the home is a nursing home, a senior assisted living facility or just better living accommodations. A reasonable jury could find that, regardless of the type of "home," the effort by Ms. Dillon qualifies as making arrangements for changes in care.

Finally, during the trial Dr. Nesbeth was questioned extensively about the *Certification* which MNCPPC had before it terminated Ms. Dillon on January 17, 2003. On the *Certification,* Dr. Nesbeth responded in the affirmative to the question, "If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation?" Based on the evidence presented at trial, a reasonable jury could find Ms. Dillon was needed to care for her grandmother in accordance with the first sentence of Jury Instruction No. 22. Defendant fails to demonstrate its entitlement to judgment as a matter of law on this issue.

5. Termination: Insubordination or Unlawful Interference with FMLA Rights?

Defendant argues Ms. Dillon was terminated because of insubordination and not because she sought FMLA leave. Since Ms. Dillon's FMLA rights were not interfered with unlawfully, Defendant is entitled to judgment as a matter of law. Defendant relies on Ms. Barney's January 3, 2003's Notice of Intent letter. In that letter Ms. Barney explains the reasons for dismissing Ms. Dillon:

> Although I understand the circumstances you were under, I had offered that you take the three weeks off at a different time. The Department denied requests made by other employees for extended annual leave during the same time frame for the same reasons. Leave is granted at the discretion of the Commission

> based upon the needs for your service in the work program. As the Department Director, I often must make difficult decisions. I try to be fair in reaching those decisions and do so after much thought and consideration of the facts presented. In this case, you were notified far in advance of the time period requested that the three weeks of annual leave would not be approved. You told me specifically that you intended to take that time off even if it wasn't approved, a clear demonstration of your disregard for Commission policy and my position as your department head. You have provided me with no credible evidence whatsoever as to how your absence was caused by anything other than a family vacation, and were provided with a fair and explicit warning about the likely consequence of your insubordinate action.

Pl.'s Ex. 9 ("CD00079); Def.'s Ex. 6, at 4.

Defendant asserts Plaintiff has the burden of demonstrating MNCPPC unlawfully interfered with her FMLA rights. Plaintiff has failed to do so since her termination was for other reasons (AWOL and insubordination). According to Defendant, the Notice of Intent and Dismissal letters clearly demonstrate Ms. Dillon's termination was for non-FMLA reasons. "Although a meritorious FMLA entitlement could change the outcome on the absen[ce]-without-leave component, the insubordination basis is unaffected, particularly in light of the uncontested facts that show Ms. Dillon never changed her airline tickets even though she knew there were no flights to standby on

between December 25-30, 2002, and further knew she could not get back to work when required and traveled to Jamaica anyway." Def.'s Combined Mem., at 32.

Defendant argues its dismissal of Ms. Dillon was meritorious. Even if not, analogous to Title VII law, MNCPPC has articulated legitimate, non-discriminatory reasons for the termination and Plaintiff has not rebutted by showing pretext. "Since Ms. Dillon was subject to dismissal regardless of the outcome of the FMLA issue, none of any alleged losses could be said to be caused 'by reason of the violation.'" *Id.* at 34. Defendant asks for judgment as a matter of law on this issue.

In her Opposition Plaintiff argues the issue of whether her termination was for non-FMLA reasons or for a FMLA reason was a factual finding which the jury resolved in Plaintiff's favor. Plaintiff notes Judge Chasanow recognized the non-FMLA reasons and the FMLA reason are intertwined.

> Although it is true that [the Notice of Intent and Final Dismissal Letters] refer to reasons other than her AWOL status as a basis for terminating Plaintiff, all of these reasons are inextricably intertwined with her request for FMLA leave, the denial of which resulted in Plaintiff's termination. Indeed, after Ms. Barney chronicled the events surrounding Plaintiff's initial request for 3-weeks leave, and her subsequent request for an extension, she explicitly stated that if she found Plaintiff's response to the Notice Letter satisfactory, including her explanation as to how the latter

> request may qualify under the FMLA, Plaintiff would not be dismissed.

Dillon, 382 F. Supp. 2d. at 791.

A reasonable jury, after listening to the testimony and reviewing documentary evidence, could find MNCPPC terminated Ms. Dillon because she extended her leave, beyond the approved period, to care for her grandmother.

In its Reply Defendant reiterates that the Notice of Intent and Dismissal letters clearly identify the bases for termination as non-FMLA reasons. At trial Ms. Barney testified that she had to evaluate two separate issues — insubordination and FMLA qualification. Ms. Barney testified that Ms. Dillon would avoid dismissal only if she proved her FMLA qualification and proved she changed her original airline ticket. Ms. Dillon failed to prove these matters. The evidence clearly shows Ms. Dillon was terminated for non-FMLA reasons. "Notwithstanding Plaintiff's contrary protestations, the insubordination issue was proper[l]y submitted to the jury and the jury's f[i]nding was in error as a matter of law." Def.'s Reply, at 11. Defendant seeks judgment as a matter of law.

At trial Ms. Barney explained how she approached resolving two distinct issues-insubordination and FMLA qualification.

> Q: In order to justify not terminating her employment, did you have to get past both issues?

A: I had to get past both issues, yes.

So if I could get past the insubordination issue - - again, being consistent throughout the department, if another person says they're going to take leave and takes it, I have to handle it the exact same way. If I could get past that by seeing that she had changed her tickets, I could move that to the side, and then 1 could see if I could still approve leave, family medical leave if she qualified, or maybe even annual leave if I could see that there was no one else to help her and I could somehow justify that, again having to live with this for the rest of the department.

So that was - - that was where I was coming from, having to deal with both of those issues, and that's what [the Notice of Intent letter] was intended to portray to Cynthia.

Tr. at 44:25 - 45:15 (March 22, 2006).

During the trial evidence was presented about Ms. Dillon's November 2002 meeting with Ms. Barney. During this meeting Ms. Dillon expressed an intention to take three weeks of leave even if it is not approved. Ms. Barney warned Ms. Dillon of the consequences. This meeting is memorialized in Ms. Barney's November 7, 2002 Record of Meeting.

Cynthia requested to meet with me and to discuss her leave request, which had been turned down. Cynthia explained that she had wanted to go to Jamaica in June for a family

reunion and to go to her uncle's funeral. The leave had been denied due to work program. She had felt badly and her family had been disappointed. She then submitted another leave request in August for 3 weeks from 12/12 to [01/02/]03. This leave request had also been turned down. Cynthia explained how important it was to her to go at this time. She hadn't been back for 5 years and that she needed to go when here [sic] children were out of school which meant summer or Christmas vacation. Her grandmother is very ill, and she wants to visit her before it is too late. She is very close to her grandmother. She also indicated that her husband had already bought the tickets.

I explained that I understood her situation; however, she should not have bought the tickets before her leave was approved. She had been informed in August that because of the personnel/payroll system implementation and year-end processing that 3 weeks off in December and early January was not possible.

Cynthia explained that she was going to go even if her leave was not approve[d]. I indicated that she would lose her job if she went without approved leave. I indicated that I would talk with Al Warfield to see if there was some way that another person, possibly in payables, might be able to cover for her during that time period. also indicated that next summer may be possible because we are trying to implement

> electron time entry or another extended period after the implementation.

Def.'s Ex. 3.

Ms. Barney testified that if Ms. Dillon had provided proof that she changed her airline tickets, she (Ms. Barney) would have gotten past the insubordination issue. *See* Tr. at 46:21-24 (March 22, 2006). However, even if Ms. Dillon was entitled to FMLA leave, Ms. Barney would have nonetheless terminated Ms. Dillon because of the insubordination issue. *See* Tr. at 54:3 - 6 (March 22, 2006). Ms. Barney further testified that Ms. Dillon appealed her termination to the appropriate board which found the termination appropriate because of insubordination and AWOL. *See* Tr. at 56:14 - 17.

The above excerpts and citations to Ms. Barney's testimony support Defendant's contention that the dismissal was strictly for non-FMLA reasons. On cross-examination the jury likely gained greater insight about Ms. Barney's views.

> Q: Ms. Barney, it's true, is it not, that she was -- Ms. Dillon would not have been in violation of her approved leave until December 23rd.
>
> A: I'm having difficulty with the question because she knew when she went on the trip -- she didn't know about her grandmother when she went on the trip, yet she took the trip knowing that there was uncertainty whether she could be back in time. So that, to me, seems like a violation of policy. If I tell somebody that

they have to be back to work back on Monday and they take an action which indicates they might not be, to me, that's a violation. That's me, my viewpoint.

Q: Well, it wouldn't be insubordination unless she violated some specific instruction, would it?

A: I think it was insubordination. I met with her. She indicated she was taking the leave, regardless if it was approved, and then she took the trip knowing that there was no guarantee that she would be able to conform with that. So that's my opinion.

Q: But doesn't every employee have the right to take that risk and hope that they'll be able to come back? Or even if they're a day late, well, at least I'm only a day late?

A: I don't believe so. I think employees try to - - are working to comply with the leave that's approved. If they know in advance that there's an issue, then I think that's a problem. If they don't know there's any problem, well, then possibly something happens, but if they - - if they know in advance that they cannot meet that commitment, I do think that's a violation.

Q: Why is it a violation? If she takes the risk that she's going to have trouble getting back on the 23rd, that's her problem at that point, is it not?

A: I believe that's my problem.

Q: Your problem comes in when she's not there on the 23rd and she's, at that point, AWOL.

A: I believe they are very related. It's my problem if an employee makes an indication to me that they will be at work on time to process a critical function in the department and they knowingly leave, knowing that there's a question as to whether they can comply with that directive. That is my answer. I'm sorry. That's how I view it.

Q: I understand that's how you view it because I think you make that pretty clear in the dismissal letter, Ms. Barney, but it is true that she put in the request for the additional leave on the 19th, before she was in violation of her approved leave through the 20th, and that had that Family Medical Leave Act application been approved, she would not have been in violation?

A: I disagree with that. I believe that when she left knowing that she could not comply with the leave request, that she had violated my direction for the time period of leave.

I don't know how else to answer that question. I'm sorry. That is my answer.

Tr. at 77:25 - 80:2 (March 22, 2006).

In the Dismissal letter, the jury may have obtained some additional insight regarding how Ms. Barney viewed Ms. Dillon's situation.

> As you know, I have repeatedly asked you for any documentary information to support your contention that your Grandmother's situation somehow required you to extend your stay in Jamaica; contrary to your previous statements which led me to believe that you had refused to change your trip schedule to conform with the period of approved leave. During our meeting on the 10th, you acknowledged that you did, in fact, return according to your original ticket and schedule. In this light, I cannot find any credible reason to believe that you ever intended to comply with my very clear direction that you were responsible to return to the office from leave on December 23, 2002.

Pl.'s Ex. 12 (#CD00064); Def.'s Ex. 9, at 1.

From Ms. Barney's testimony and written statements, a jury could reasonably infer Ms. Barney did not believe Ms. Dillon ever had the intention to return to work on December 23, In fact, Ms. Barney believed Ms. Dillon was in violation when she departed on December 12, 2002 because Ms. Dillon did not have a return ticket guaranteeing an arrival before December 23, 2002. According to Ms. Barney, despite the fact that Ms. Dillon requested an extension on December 19, 2002, a day before her approved leave ended on December 20, 2002, Ms. Dillon nonetheless violated Ms. Barney's direction because Ms. Dillon did not have a guaranteed flight returning her before December 23, 2002. In short, a jury could reasonably infer Ms. Barney disbelieved Ms. Dillon's assertion of a need for leave to take care of her grandmother. "You have provided me with *no credible evidence* whatsoever

as to how your absence was caused by anything *other than a family vacation*, and were provided with a fair and explicit warning about the likely consequence of your insubordinate action." Pl.'s Ex. 9 ("CD00079) (emphasis added); Def.'s Ex. 6, at 4 (emphasis added).

On cross-examination Ms. Barney would not acknowledge that Ms. Dillon would not be in violation of her approved leave until she failed to report for work on December 23, 2002. "[S]he didn't know about her grandmother when she went on the trip, yet she took the trip knowing that there was uncertainty whether she could be back in time. So that, to me, seems like a violation of policy." Tr. at 78:4 - 7 (March 22, 2006). This demonstrates how "inextricably intertwined" the non-FMLA reasons and the FMLA reason are. A reasonable jury could infer from Ms. Barney's January 3, 2003 Notice of Intent letter, if Ms. Dillon provides a satisfactory response about her entitlement to FMLA, Ms. Dillon would not be dismissed. *See* PL's Ex. 9; Def.'s Ex. 6.

In Jury Instruction No. 10, the jurors were told, "You are the sole judges of whether testimony should be believed. In making this decision, you may apply your own common sense and everyday experiences." Reasonable jurors, applying their own common sense and everyday experiences, may have rejected Ms. Barney's testimony that Ms. Dillon was insubordinate as of December 12, 2002, because Ms. Dillon did not possess a return ticket before December 23, 2002. "I think the jury can construe that she was in a leave status until Monday morning, the 23rd. How she came back really wasn't for the Maryland National Capital Park and Planning Commission to decide . . . so long as

she walked into work on Monday morning and could do the payroll, she would be in compliance." Tr. at 76:19 - 22, 25 - 77:2 (March 22, 2006). The jury had the discretion to "reject all of the testimony of a particular witness, none of the testimony of a particular witness, or part of the testimony of a particular witness." Jury Inst. No. 10. A reasonable jury could find, after listening to the testimony and reviewing documentary evidence, the insubordination issue and FMLA leave request are "inextricably intertwined" because Ms. Dillon would not have been insubordinate had Ms. Barney granted Ms. Dillon's request for extension of leave to care for her grandmother. Defendant fails to demonstrate its entitlement to judgment as a matter of law on this issue.

6. Proof of Lost Wages

Defendant claims the lost wage award of $76,914 is not supported by the evidence. Defendant notes Plaintiff failed to present a methodology or evidentiary support to enable the jury to determine damages. Plaintiff's counsel suggested $75,000 award[8] for lost damages without providing a methodology for calculating this amount. Defendant contends Plaintiff should not be awarded more than $62,088.72. This figure is derived by calculating the total wages ($169,296.64) Ms. Dillon would have received from MNCPPC from January 17,2003 to March 23, 2006, including 3.5% annual merit increases, minus the amount ($97,415.89) Ms. Dillon earned

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[8] Actually, Plaintiff's counsel argued for $70,000 to $75,000 as any appropriate award. *See* Tr. 161:3 - 8 (March 22, 2002).

post-termination as reflected on W-2s and the annual leave payout ($9,792.03). Defendant seeks judgment as a matter of law or, in the alternative, an order amending or altering the judgment to $62,088.72.

In her Opposition Plaintiff notes she was earning $50,286.81 when she was terminated on January 17, 2003. A reasonable jury could have found, with a 3.0% cost of living adjustment and a 3.5% merit based increase annually, Plaintiff would have earned $183,014.73 from January 17, 2003 to March 23, 2006. Even if $97,415.89 as earned post-termination income and $9,792.03 as annual leave payout are deducted, Plaintiff would be entitled to receive $75,806.81, within the range of the jury's verdict and well above the $62,088.72 maximum award suggested by MNCPPC. Pl.'s Opp'n, at 24-25. Moreover, while MNCPPC subtracts all of Plaintiff's post-termination income from the total amount owed to Plaintiff, a reasonable jury could have found, if Plaintiff had not been terminated, she would have worked for MNCPPC as well as a part-time job. "[T]herefore, the jury could have reasonably not subtracted at least one of the other part-time jobs from the back pay total. This would have put plaintiff over the $76,914 total that the jury came to." *Id.* at 25. Plaintiff asks that the jury's verdict as to damages not be altered or amended.

In its Reply Defendant notes, for the first time during post-trial motions, Plaintiff has identified a methodology for calculating a back pay award. Defendant claims Plaintiff improperly relies upon information not presented at trial, specifically an annual cost of living adjustment of 3%, to support the jury's verdict. Defendant also rejects Plaintiff's

assertions, articulated for the first time post-trial, (1) that a reasonable jury need not deduct all of Plaintiff's post-termination income from an award and (2) that a reasonable jury could assume Ms. Dillon would have worked at least one part-time job had she not been terminated by MNCPPC, and therefore the income for such a part-time job need not be deducted from the back pay award. "Ms. Dillon never advanced either of these arguments during trial so she certainly could not have provided any proof that she could have worked both jobs." Def.'s Reply, at 16-17 (footnote omitted).

In Jury Instruction No. 38, the jurors were told:

> The burden is on the plaintiff to prove by preponderance of the evidence each item of damage claimed to be caused by the defendant. In considering the items of damage, you must keep in mind that your award must adequately and fairly compensate the plaintiff, but an award should not be based on guesswork.

The Court rejects Plaintiff's assertion that the jury's verdict of $76,914 could have possibly included income earned from a part-time job. No evidence was introduced supporting such an assertion and an award including such compensation would have been based on guesswork. Further, no evidence was introduced

regarding 3.0% annual cost of living increase.[9] One reference was made about annual cost of living increases but no definite percentage was ever introduced. Plaintiff did not introduce this evidence. It was elicited by Defendant in its case in chief.

> Q: With Ms. Dillon, was she a grade *G* in the Commission's classification system?
>
> A: Yes, she was.
>
> Q: Is there a top of the range for that position?
>
> A: Yes, there are. In each of the grade levels, there's a minimum and a maximum salary that

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[9] Plaintiff argues evidence was submitted to the jury regarding a cost of living increase. "[P]laintiff's exhibit 2 shows that Plaintiff's salary rose by 3% from $47,165.43 per year to $48,586.29 per annum between October 2001 and November 2002 - a difference a reasonable jury could have found that can only be accounted for by a cost of living increase since the merit based 3.5% increases are reflected elsewhere on those pages." Pl.'s Opp'n, at 24 n.9. Even though this may be true, no evidence was presented that the cost of living increase of 3.0% was given annually. Plaintiff's counsel did not specifically include a *3.0% cost of living increase* in his closing argument to the jury. "If you give, as you're entitled to do, 3.5 percent, as we showed she was getting about the time that she was still working for the employer during the two evaluations, she was getting 3.5 percent increases each year, you tack that on to the last paycheck that she had for that, and you will see that there's approximately 70 to $75,000 difference in pay, which we maintain she's entitled to as the cost of getting fired when she was entitled to family medical leave." Tr. at 160:25 - 161:8 (March 22, 2006).

you can earn in a particular grade, and there is - - what we call top of grade is when you've hit that maximum, you no longer would get the three and a half percent increase. If you received a two on your evaluation, you would get a three and a half percent increase. It's called a merit increase. But if you reach that top of grade, you do not receive that.

Q: So would there come a point in time that other than *cost of living increases*, Ms. Dillon's salary at the Commission would have been capped?

A: If she reached that top of grade, yes, that's true.

Q: To your knowledge, had she been in her grade for quite awhile by the time of 2002?

A: I believe she had been in her grade a long time, yes.

Tr. at 86:9 - 87:2 (March 22, 2006) (emphasis added).

Plaintiff's counsel makes a passing reference to cost of living increases in closing argument. *See* Tr. at 160:24 - 25. He does not indicate however what that percentages were from January 17, 2003 to March 23, 2006. Plaintiff had the burden of proving she is entitled to an annual cost of living increase and also the burden of proving what that rate would have been.

Besides Ms. Barney's testimony concerning the 3.5% merit increase, Ms. Dillon provided testimony on this topic.

Q: Ms. Dillon . . . can you identify Plaintiff's Exhibit 2 and what that records?

A: Yes. This is the - - we call this the PA2, which is the personnel action, where at your anniversary, this gives you - - tells you what your next salary is going to be.

Q: Okay. And is this associated with the quality of the evaluation you got at the end of the year?

A: Yes.

Q: In other words, I notice you got a 3.5 percent increase on this exhibit, Plaintiff's Exhibit Number 2. Could it have varied? It could have been less?

A: I think this is the normal - - because I get a two, then you get it. If you don't get a two, then you don't get it.

Q: I see. So if you had not achieved the two on your overall rating, you wouldn't have gotten the 3.5?

A: No.

Q: Okay. So it's consistent with the evaluation you've received?

A: Yes, sir.

Q: And is the next document there also for the very next year?

A: Yes, sir

Q: And it shows again a 3.5, and was that consistent with the two overall rating you achieved for that year?

A: Yes, sir.

Tr. at 73:23 - 74:22 (March 21, 2006). Despite Ms. Barney's testimony, see Tr. at 86:9 - 87:2 (March 22, 2006), Defendant has not presented any evidence affirmatively establishing Ms. Dillon was not entitled to receive a 3.5% merit increase annually between January 17, 2003 and March 23, 2006 because Ms. Dillon had reached the top of her grade. The Court thus finds Ms. Dillon would be entitled to a 3.5% increase annually on her anniversary date of September 19th.

It is undisputed, that post-termination, in 2003 Ms. Dillon earned $4,824.00 from Benevolent Home Health Care, Inc., $9,792.03 (as annual leave payout) from MNCPPC and $3,140.38 from Heartland Employment Services ("Heartland"), for a total of $17,756.41. *See* Pl.'s Ex. 14, at 2. In 2004 Ms. Dillon earned $33,691.36 from the American Institute of Certified Public Accountants ("AICPA"), $1,553.00 from ATC Healthcare Services, Inc., and $8,688.15 from Heartland, for a total of $43,932.51. *See id.* at 3. In 2005 Ms. Dillon earned $44,079.84 (true gross through

December 15, 2005) and $2,044.07 (presumed true gross for last paycheck for the year)[10] from AICPA for a total of $46,123.91. *See id.* at 4. The total wages earned from 2003 through 2005 are $107,812.83.

Plaintiff apparently did not disclose to Defendant her methodology for calculating lost wages before trial. A reasonable jury could calculate Plaintiff's lost wages based on her gross salary from MNCPPC, including a 3.5% merit increase annually, for each year thereafter and deducting gross income earned during that period. *See* Tr. at 115:25 - 116:5 (March 21, 2006).

Defendant claims Ms. Dillon would have earned $169,296.64 as the total amount of wages, including 3.5% annual merit increase, from January 17, 2003 to March 23, 2006. *See* Def.'s Combined Mem., at 35. Plaintiff claims the earned income would have totaled $183,014.73 which includes both a 3.0% annual cost of living adjustment and a 3.5% annual merit increase. *See* Pl.'s Opp'n, at 24. Having found it would have been unreasonable for the jury to assume Plaintiff received a 3.0% cost of living adjustment annually, the Court does not accept Plaintiff's figure. While Defendant's figure does not include the cost of living adjustment, Defendant does not demonstrate how it arrives at its figure. Because Plaintiff's figure includes 3.0% cost of living adjustment and Defendant's figure cannot be verified, the Court will defer amending or altering the judgment until the parties file supplemental calculations. *See infra.*

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[10] The Court makes this assumption since Plaintiff did not introduce as evidence her 2005 W-2.

7. Mitigation of Damages

Defendant contends Plaintiff's award for lost wages should have been reduced because Plaintiff failed to mitigate her damages. Under Fourth Circuit law, Plaintiff must mitigate damages by diligently seeking new employment substantially similar to the type held before being discharge, citing *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1273 (4th Cir. 1985). The information Ms. Dillon provided during trial about her attempts to secure employment was vague. "She said that she applied to temporary employment agencies and posted her resume on an internet job site (Monster.com). The [MNCPPC] submits that the conclusion that Ms. Dillon exercised reasonable diligence is belied by a failure, with her administrative background, to even secure even [sic] a single administrative assignment from a temporary agency in a nine-month period. Instead, the evidence showed that she turned her attention to an educational program directed toward an alternate career." Def.'s Combined Mem., at 37. Defendant claims the jury's finding on mitigation was against the weight of evidence and therefore a new trial is mandated.

In her Opposition Plaintiff contends, after she has established entitlement to back pay, then Defendant has the burden of demonstrating its affirmative defense that Plaintiff failed to mitigate damages. Plaintiff notes Defendant did not introduce any evidence about the availability of substantially equivalent positions from which Plaintiff was terminated. This alone is fatal to Defendant's argument. Second, Defendant does not demonstrate that a reasonable jury could find Plaintiff failed to

mitigate her damages upon termination. "Plaintiff testified that she made numerous applications for employment after being terminated by defendant, but was simply unable to obtain employment . . . [S]he repeatedly sought employment, including posting her resume on the web, looking through want ads and filling in applications. Indeed eventually she took nursing classes because she could not find work in her chosen field – and then found employment, albeit lower paying, in this new field." Pl.'s Opp'n, at 26-27. Plaintiff argues a reasonable jury could find Defendant failed to meets its burden of showing Plaintiff failed to mitigate damages.

In its Reply Defendant notes, once a wrongfully discharged employee produces evidence to support her claim for back pay based on an inability to find comparable work, then the employer has the burden of demonstrating the employee's efforts to mitigate her damages were not reasonable. Defendant argues Plaintiff never satisfied her burden; thus, the burden never shifted to Defendant. Plaintiff's evidence is lacking because she never proved the extent of her search by citing the frequency of such activity. Since Plaintiff failed to prove she was actively seeking employment, the jury's conclusion on mitigation was against the weight of evidence and a new trial is mandated.

In Jury Instruction No. 38 the jury was told Plaintiff has the burden to prove each item of damage claimed to be caused by Defendant. The jury was instructed on mitigation as follows:

> You are also instructed that the plaintiff has a duty under the law to "mitigate" her damages — that is, to exercise reasonable diligence under the circumstances to minimize her damages. Therefore, if you find by a preponderance of the evidence that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to her, you must provide an amount that should be subtracted from the award.
>
> Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.

Jury Inst. No. 39.[11]

"[T]he duty to mitigate damages requires that the claimant be reasonably diligent in seeking and accepting new employment substantially equivalent to that from which he was discharged." *Brady*, 753 F.2d at 1273. The employer bears the burden of demonstrating that the employee failed to mitigate damages. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4th Cir. 1995). In demonstrating this failure to mitigate damages, an employer is not required to prove the availability of substantially equivalent jobs which the employee could have secured. *Quint v. A. E. Staley Mfg.* Co., 172 F.3d 1, 16 (1st Cir. 1999).

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[11] Source: Sand, et al., *Modern Federal Jury Instructions*, Instruction 88-150.

On direct examination Ms. Dillon testified, after being terminated by the MNCPPC, she made efforts to secure employment. She signed up online, applied with temporary agencies and sought opportunities by word of mouth. Unable to find a job, she became frustrated and registered for a nursing assistant course which started in March 2003 and ended in August 2003. *See* Tr. at 109:25 - 110:9 (March 21, 2006). Ms. Dillon subsequently secured employment as a nursing assistant and worked for two health care employers in 2003. *See* Tr. at 110:10 - 14, 111:8 - 23 (March 21, 2006).

On cross-examination, Defendant's counsel inquired about Ms. Dillon's efforts to secure employment.

> Q: Ms. Dillon, you indicated that you made efforts to secure employment after employment was terminated in January.
>
> A: Yes, sir.
>
> Q: When did you first become employed after January?
>
> A: I first became employed with - - I honestly don't remember the exact date, but I think in - - I started working with Benevolent first, and then Manor Care hired me in September, somewhere about there.
>
> Q: September. So from January to September, you were unemployed in 2003?

A: Yes, sir.

Q: And you said that you had gone online, I think, and tried to sign up with temporary agencies?

A: No. I - - you know, they have where you can post your resume. I post my resume, and I applied with temporary agencies.

Q: Okay, I guess I'm hearing a distinction. You - - you didn't - - you posted your resume with temporary agencies but you didn't - - did you actually pursue opportunities?

A: Yes, sir. Yes, sir. Most of the temporary agenc[ies] that I called up, they weren't using anyone at the time. And also I posted my resume on Monster.com. I applied on several - - for several jobs over the internet and also by word of mouth.

Q: What type of jobs did you apply for?

A: I was looking for administrative, mainly administrative, the field that I was in. Administrative.

Q: But so is it your testimony that with you skill set, you weren't able to get a temporary job for a nine-month period?

A: Yes, sir. And I was really shocked at that time.

* * *

Q: When - - at the time when you were pursuing unemployment and pursuing your Merit Board appeal, were you looking for work at that point, or did you wait?

A: No, sir. I had to - - I diligently search for work. I have always worked since I came to this country. This period of time was my first time not working for such a long time.

Tr. at 128:15 - 129:21, 130:8 - 14 (March 21, 2006).

Based on Ms. Dillon's testimony, a reasonable jury could find Ms. Dillon was diligent in seeking employment. After two months of fruitless searching for a comparable administrative employment, Ms. Dillon decided to become trained as a nursing assistant in order to secure employment. Although neither counsel asked why Ms. Dillon sought training as a nursing assistant, a reasonable jury could infer, based on job announcements or her interactions with temporary agencies, Ms. Dillon may have learned her best chance of securing employment (with the least amount of time and money for training) was as a nursing assistant. A reasonable jury could also find, as a wife and mother of five children, Ms. Dillon had sufficient motivation to find employment and would have diligently sought such employment. A reasonable jury could find Defendant did not prove that Ms. Dillon failed to mitigate her damages.

B. Motion for New Trial

Defendant lists 10 reasons why a new trial should be granted because of unfair prejudice. The Court addresses each reason below.

1. Admission of Post-January 17, 2003 Information

At trial the Court permitted the admission of information that was not relayed to the MNCPPC before Ms. Dillon's termination on January 17, 2003. That evidence "consisted of testimony that Ms. Dillon's mother was 16 when she was born, financial support from her grandmother, Ms. Dillon being kicked out of the house by her mother when she became pregnant and details regarding living arrangements and time frames that were never shared with the [MNCPPC] in spite of repeated entreaties and good faith efforts recognized by this Court in granting partial summary judgment to Defendant." Def.'s Combined Mem., at 38. Defendant claims Jury Instruction No. 34, which directed that jurors not to consider post-January 17, 2003 information, was ineffective as a limiting instruction. Defendant argues admission of that information was unfairly prejudicial.

In her Opposition Plaintiff notes the Court resolved this issue when the Court granted in part and denied in part Defendant's Motion *in Limine*. *See* Document No. 45. Plaintiff relies on the Court's reasoning. In its Reply Defendant contends Plaintiff relied on the post-January 17, 2003 information to support the jury's verdict, thus demonstrating the unfair prejudice to Defendant.

In this Opinion *supra*, the Court has identified how a reasonable jury could find Ms. Dillon's grandmother qualified as a parent under the FMLA and that her grandmother suffered a "serious health condition" by adhering to the Court's instruction and not considering any post-January 17, 2003 information. For the reasons outlined in the March 3, 2006 Memorandum Opinion (Document No. 44, at 1-7), the Court finds Defendant was not unduly prejudiced and denies the request for a new trial on this ground.

2. Admission of Dr. Nesbeth 's Testimony

Defendant claims it was unfairly prejudiced by the testimony of Dr. Nesbeth. Her testimony was not limited to authentication of the Medical Certification form. Despite Defendant's objections, she provided opinion testimony. Defendant notes Plaintiff's failure, during discovery, to identify Dr. Nesbeth as a hybrid expert and to produce responsive documents. "The expert/opinion component of her testimony was never disclosed even in the Pre-trial Order and no discovery was provided as would fairly meet the substance of the requests directed specifically to expert opinions and documents. . . ." Def.'s Combined Mem., at 39. Defendant thus did not have the opportunity to identify and retain a responsive expert.

In her Opposition Plaintiff notes the Court ruled on this matter before a jury was empaneled, holding that Dr. Nesbeth was a fact witness since she was the grandmother's treating physician and thus not especially retained for litigation. Plaintiff claims she provided notice to Defendant in response to discovery and in the pre-trial statement. Despite this knowledge

Defendant never attempted to depose Dr. Nesbeth. According to Plaintiff, Defendant was aware of Dr. Nesbeth's opinion when Ms. Dillon submitted the portion of the FMLA certification completed by Dr. Nesbeth.

In its Reply Defendant asserts Plaintiff identified Dr. Nesbeth as the provider of the FMLA medical certification form and further disclosed Dr. Nesbeth could testify regarding the need to find an assisted living residence for the grandmother. Defendant does not believe Dr. Nesbeth testified about the need for assisted living. Defendant argues Plaintiff relied on Dr. Nesbeth's undisclosed opinion as well as embellishments and expansions outside of the FMLA medical certification form, to prove that the grandmother had a serious health condition and that Ms. Dillon was needed to care for the grandmother. Defendant reiterates it was unfairly prejudiced and thus a new trial is mandated.

The Court has quoted Dr. Nesbeth's testimony extensively. *See supra*. Dr. Nesbeth was permitted to provide background information about a "TIA", an abbreviation clearly listed on the FMLA medical certification form, to explain the condition to the jurors. Dr. Nesbeth has been the grandmother's treating physician since 1997. On the form Dr. Nesbeth wrote that the grandmother was 81 years old. On the form Dr. Nesbeth opined that the grandmother would be incapacitated for two to three weeks. On the form Dr. Nesbeth answered in the affirmative that the grandmother required assistance for basic medical or personal needs or safety or for transportation. All of this information was available to the MNCPPC *before*

January 17, 2003. Dr. Nesbeth was examined, both on direct and cross, about the bases for her opinions. The Court finds Defendant was not unduly prejudiced and a new trial is not mandated on this issue.

3. Exclusion of Merit Board Decision

Defendant contends the Court improperly excluded from evidence Defendant's Exhibit 10, Merit Board Decision, which was offered to demonstrate Ms. Dillon was terminated for non-FMLA reasons. According to Defendant this exhibit should have been admitted, especially in light of the jury's questions. In her Opposition Plaintiff argues the Court's decision was proper since the Merit Board Decision is irrelevant and, like EEOC decisions, are normally not disclosed to a jury. In its Reply Defendant responds, "Plaintiff did not meaningfully address the prejudicial failure to admit the Merit Board Decision (Exhibit 10) and its relevance to insubordination and the jury's questions." Def.'s Reply, at 20.

Before returning the verdict, the jury had three questions. The first two questions are relevant to this issue. The first question asked to define insubordination. The Court proposed to instruct the jury as follows: "A willful disregard of an employer's instructions, especially behavior that gives the employer cause to terminate a worker's employment; an act of disobedience to proper authority, especially a refusal to obey an order that a superior officer is authorized to give." Tr. at 2:12 - 17 (March 23, 2006). The second question concerned a specific exhibit, which the jury identified as [Bates] Number 1933-CD00068, which is Plaintiff's Exhibit 12, page

5.[12] This page lists "Examples of Possible Causes of Disciplinary Action." The jury's question was whether Category 1933 — Failure or refusal to perform duties and responsibilities assigned that may include but is not limited to (1933.1) Neglect of duty; (1933.2) Failure to follow direction — is considered insubordination. The Court proposed to instruct the jury as follows: "You must make this determination based on the evidence you have and my instructions, including the instruction listed immediately above [answer to Jury Question No. 1]." Tr. at 2:20 - 23 (March 23, 2006).

Defendant's counsel objected to Court's proposed answer to Jury Question No. 2.

> With regard to the response to the second question regarding Section 1933, including 1933.2 and 1933.1, the Commission's position is that those provisions constitute insubordination as a matter of law and could be so interpreted as a matter of law to be tantamount to insubordination or synonymous with insubordination, and for that reason, we believe the Court could instruct with an affirmative answer to that question as a matter of law.

Tr. at 3:8 - 16 (March 23, 2006). After considering Defendant's objection, the Court instructed the jury as it had proposed.

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[12] Although Plaintiff's Exhibit 12 and Defendant's Exhibit 9 are virtually identical, Plaintiff's Exhibit 12 includes an extra page, Bates # CD00068, the subject of the jury's second question.

This Court has discretion whether to admit or exclude the findings of an administrative body such as tl e Merit Systems Board. *Cox v. Babcock & Wilcox Co.*, 4'/1 F.2d 13, 15 (4th Cir. 1972). The Court excluded the proposed Defendant's Exhibit 10 to prevent the jury from being unduly influenced by the Merit Systems Board's decision which, in turn, could invade the province of the jury. Defendant is not entitled to a new trial on this issue.

4. Jury Instruction Regarding Unlawful Interference

"The failure to instruct that part of Plaintiff's burden in demonstrating unlawful interference was to show that she would not have been terminated otherwise was unfairly prejudicial in a way demonstrated to be critical by the jury's questions submitted during deliberation as it was Plaintiff's burden to show that she would have otherwise continued to be employed in order to prove any alleged damages were caused 'by reason of the violation.'" Def.'s Combined Mem., at 40. In her Opposition Plaintiff claims there is no legal support for Defendant's proposition. Normally, the burden is on Defendant to demonstrate Plaintiff would have been otherwise terminated once Plaintiff has shown her termination was for discriminatory reasons. In its Reply Defendant reiterates that it is Plaintiff's burden to prove she would have otherwise continued to be employed in order to prevail on a claim of damages caused by Defendant's alleged violation.

The Court gave the following instruction to the jury:

> Since, under the FMLA, an employee's rights in the workplace are no greater than the rights to which the employee is entitled had she not taken FMLA leave, an employer who interferes with an employee's FMLA rights will not be liable if the employer can prove that it would have made the same decision, in this case to terminate Ms. Dillon's employment, had the employee not exercise her FMLA rights.

Jury Inst. No. 32.

Defendant's counsel objected to this instruction.

> With regard to 32, the objection is that it is the - - although we believe that the instruction is largely appropriate that the defendant does not bear the burden or the employer does not bear the burden on that issue, it is bound up in the unlawful interference issue.

Tr. at 146:25 - 147:4 (March 22, 2006). For the record, Plaintiff's counsel also objected to this instruction, but on the ground that intent is not an issue in the case. *See id.* at 145:15 - 16 (March 22, 2006).

The Court derived Jury Instruction No. 32 from the Comment to Instruction 88-120 found in Sand, et al., *Modern Federal Jury Instructions*. The Comment states:

> Since, under the FMLA, an employee's rights in the workplace are no greater than the rights to which the employee is entitled had he or she not taken FMLA leave, an employer who interferes with an employee's FMLA rights will not be liable if the employer can prove that it would have made the same decision, i.e., terminate or demote the employee, had the employee not exercised his or her FMLA rights.

Footnote omitted.

In accordance with Jury Instruction No. 16, Plaintiff had to demonstrate that she met all eight elements to maintain a FMLA claim based on the need to care for her grandmother with a serious health condition. If she satisfied all eight elements, a reasonable jury could find, in answering Question No. 1 of the Verdict Form, that MNCPPC unlawfully interfered with Ms. Dillon's exercise of a protected right under the FMLA by denying her request for leave. Even if a reasonable jury found an unlawful interference, a reasonable jury need not automatically find the MNCPPC terminated Ms. Dillon because she exercised a protected right. A reasonable jury could have found, in answering Question No. 2 of the Verdict Form, that MNCPPC terminated Ms. Dillon because she was insubordinate. The burden of proving that Ms. Dillon's FMLA rights were not unlawfully interfered with, because she would have been terminated despite the exercise of that protected right, properly rests with Defendant. A new trial is not warranted on this issue.

5. Jury's Second Question Regarding Specific Merit Rule Sections

"The jury's second question regarding whether the cited Merit Rule sections were insubordination should have been answered in the affirmative as they were as a matter of law based on the meaning of insubordination. Based on submission of the question, this point obviously was of importance to the jury and the failure to answer affirmatively was unfairly prejudicial to Defendant." Def.'s Combined Mem., at 40. The Court addressed this issue in Section 3 (Exclusion of Merit Board Decision) *supra*. A new trial is not warranted on this issue.

6. An Estoppel Instruction

Defendant claims the jury should have been instructed on estoppel "based on Ms. Dillon's conduct, particularly the failure to seasonally provide information and fraudulent information provided in the application." Def.'s Combined Mem., at 40. In her Opposition Plaintiff asserts "[t]his premise is clearly in dispute and was itself a factual issue for the jury to decide." Pl.'s Opp'n, at 29. Additionally, Defendant does not provide a legal basis for an estoppel instruction. In its Reply Defendant contends an estoppel instruction should have been given because MNCPPC, in good faith, relied to its detriment upon Ms. Dillon's representations. Defendant notes at least one court in the Fourth Circuit has permitted the use of the equitable estoppel doctrine in a FMLA case, citing *Blakenship v. Buchanan General Hosp.*, 999 F. Supp. 832, 837-39 (W.D. Va. 1998).

Having reviewed *Blakenship*, this Court finds an estoppel instruction is not warranted. It is noteworthy that all the cases cited in *Blakenship* concern the estoppel doctrine applying against the employer, not the employee, for misrepresentation. Second, the facts of this case do not involve an *undisputed* case of misrepresentation. Although Ms. Barney concluded Ms. Dillon provided no credible evidence that her absence from work was caused by anything other than a family vacation, a reasonable jury could conclude Ms. Dillon's absence from work was due to the need to care for her grandmother who had a serious health condition. The jurors were the sole judges of the facts and apparently found Plaintiff's case more believable. Regarding Defendant's assertion that it made its decision to terminate Ms. Dillon based on the information she provided before January 17, 2003 and thus MNCPPC relied on this information to its detriment, the jury was instructed that any information not provided to MNCPPC before January 17, 2003 may not be considered on the issue of whether MNCPPC interfered with any FMLA rights Ms. Dillon may have had. *See* Jury Inst. No. 34. No evidence has been presented that the jury failed to follow the Court's instruction. A new trial is not warranted on this issue.

7. Verdict Form

Defendant argues that a new trial is warranted because the verdict form should have required the jury to find each element of FMLA qualification. In her Opposition Plaintiff notes Defendant cites no authority for its proposition. The jury was specifically instructed on the elements Plaintiff needed to prove in order to

support her FMLA claim per Jury Instruction No. 16. Plaintiff contends listing the elements in the instructions and also on the verdict form would have been confusing and superfluous. In its Reply Defendant claims, "failing to submit separate questions limited the jury's inquiry in a way that was confusing." Def.'s Reply, at 21.

Jury Instruction No. 16 is very explicit. It begins, "[i]n order for a plaintiff to maintain a FMLA claim based on the need to care for a spouse, parent, son or daughter with a serious health condition, the plaintiff must prove all [eight] elements by a preponderance of the evidence. . . ." The eight elements are listed in Jury Instruction No. 16 and definitions are provided in subsequent instructions. Although the verdict form did not require the jury to make a finding as to each and every element as listed in Jury Instruction No. 16, the Court finds a reasonable jury, after listening to Jury Instruction No. 16 and having a written copy of the instruction during deliberations, would not have found that Plaintiff proved by a preponderance of the evidence that MNCPPC had unlawfully interfered with the exercise of a protected right under FMLA by denying her requested leave (Question No. 1) *if* the jury found that Plaintiff had not proven all eight elements of Jury Instruction No. 16. A new trial is not warranted on this issue.

8. Substitution of Caregiver Instruction

"The Jury should not have been instructed on the FMLA substitution of caregiver issue as there was no evidence sufficient to support it in light of the misleading application and [in] fact this basis was

never provided to the employer prior to decision." Def.'s Combined Mem., at 40- 41. Defendant alludes to Jury Instruction No. 22. In her Opposition Plaintiff responds there was evidence introduced that Ms. Dillon was needed to care for her grandmother because the grandmother's normal caretaker was unavailable during the day. Even if this information was not provided pre-termination, the Court allowed the introduction of this evidence which Plaintiff argues is relevant to show Ms. Dillon was in fact qualified for FMLA leave. In its Reply Defendant states, "Counsel's testimony regarding an undisclosed caregiver not being able to care for Plaintiff's grandmother while at work is pure speculation not grounded in record evidence. Even if it had been it would be of dubious import given that the situation existed both before and after Plaintiff journeyed to Jamaica and had no relationship to the events at bar." Def.'s Reply, at 22.

Jury Instruction No. 22, which defines the phrase, "needed to care for," provides the following guidance relevant to Defendant's issue: "The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home." Jury Inst. No. 22 (emphasis added). Defendant focuses exclusive on the first clause (where the employee may be needed to fill in for others who are caring for the family member). Based on the evidence presented and this Court's instructions prohibiting the consideration of post-January 17, 2003 information, a reasonable jury could find Ms. Dillon was needed to care for her grandmother because she was making arrangements for changes in care (the second clause). In is

undisputed that in her e-mails to Ms. Barney prior to January 17, 2003, Ms. Dillon sought an extension because her grandmother was ill and Ms. Dillon needed to find a better place for her grandmother to live. Defendant has presented no evidence showing the jury relied on the first clause, vice the second clause in determining Ms. Dillon's FMLA entitlement. A new trial is not warranted on this issue.

9. Mandatory Language

"The notice instruction should have been phrased consistently in mandatory language throughout the instruction." Def.'s Combined Mem., at 41. Defendant alludes to Jury Instruction No. 25. In her Opposition Plaintiff recalls the Court ruled on this issue during the charge conference. The Court used the precise language in the regulation. Defendant did not address this issue in its Reply.

The Court instructed the jury on the issue of notice, as follows:

> When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.

> The phrase "appropriate notice" as used in these instructions means that the plaintiff must have notified defendant of her need for leave as soon as practicable after she learned of the need to take leave.

The first paragraph of Jury Instruction No. 25 is quoted directly from 29 C.F.R. § 825.303(a), the first two sentences. The second paragraph of Jury Instruction No. 25 is quoted directly from Instruction 88-135 of Sand, et al., *Modern Federal* Jury *Instructions*. Besides using the definition for notice as listed in the Code of Federal Regulations, the Court included the definition from *Modern Federal Jury Instructions* because Jury Instruction No. 16, which is based on Instruction 88-101 of *Modern Federal Jury Instructions*, uses the phrase "the plaintiff gave defendant *appropriate notice* of [his/her] need to be absent from work" as one of the elements Plaintiff must prove. A new trial is not warranted on this issue.

10. Mixed Motive Instruction versus Motivating Factor Instruction

"A 'motivating factor' instruction should not have been given. If one was to be given, a mixed motive instruction also should have been provided." Def.'s Combined Mem., at 41. Defendant alludes to Jury Instruction No. 30. In her Opposition Plaintiff claims it is unclear what Defendant seeks since the court, in effect, gave a mixed motive instruction and verdict form. "Normally, a mixed motive instruction implies that the court will instruct the [jury] to determine whether even if defendant discriminated against plaintiff defendant would have terminated plaintiff

anyway and the jury will answer that question on the verdict form." Pl.'s Opp'n, at 30-31. Plaintiff contends that happened in this case. In its Reply Defendant rejects Plaintiff's assertion about how the jury was instructed and contends the jury should have been instructed about a mixed motive.

Both parties agree that the jurors were properly instructed on the eight elements Ms. Dillon had to meet in order to maintain her FMLA claim, *see* Jury Instruction No. 16, though Defendant contends jurors should have been required to place their finding as to each element on the verdict form. It is undisputed that the eighth element Ms. Dillon had to prove was that her "absence from work was a motivating factor in defendant's decision to discharge plaintiff." Jury Inst. No. 16 (emphasis added). Plaintiff proposed the "motivating factor" instruction. The Court ultimately determined this instruction is appropriate based on the term "motivating factor" being used in Jury Instruction No. 16. Jurors needed some guidance on the scope of the term "motivating factor." Jurors were instructed as follows: "The term 'motivating factor' means a consideration that moved the defendant toward its decision, a factor that played a part in the employment decision." Jury Inst. No. 30. Defendant's basis for a mixed motive instruction is addressed by Jury Instruction No. 32 and Question No. 2 of the Verdict Form. A new trial is not warranted on this issue.

C. Motion to Alter or Amend Judgment

As discussed *supra*, the Court finds a reasonable jury could not have found that Plaintiff was entitled to

receive an annual 3% cost of living adjustment. Thus, the award of $76,914 as lost damages is not supported by the evidence. In determining the amount of lost wages Ms. Dillon is entitled to receive, Plaintiff included an annual 3% cost of living adjustment in her calculations. Defendant identified a figure but failed to demonstrate the calculation used to arrive at the sum. Thus, the Court will defer altering or amending the judgment pending receipt of Plaintiff's and Defendant's calculation of the maximum total lost wages Ms. Dillon was entitled to receive based on 3.5% annual merit increase from January 17, 2003 to March 23, 2006. Each party must demonstrate the computations used to arrive at their respective figures. The parties must submit their figures and computations not later than November 6, 2006.

CONCLUSION

For the foregoing reasons, Defendant's Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial will be denied. Defendant's Motion to Alter or Amend Judgment will be held in abeyance pending receipt of requested information. An Order will be entered separately.

October 27, 2006
Date

/s/
WILLIAM CONNELLY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. WGC-04-994

[Filed October 27, 2006]

CYNTHIA DILLON, Plaintiff,	)
v.	)
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, Defendant.	)

ORDER

In accordance with the foregoing Memorandum Opinion, IT IS, this 27th day of October, 2006, by the United States District Court for the District of Maryland, **ORDERED:**

1. That Defendant's Renewed Motion for Judgment as a Matter of Law (Document No. 58), BE, and the same hereby IS, **DENIED**;

2. That Defendant's Motion for a New Trial (Document No. 59), BE, and the same hereby IS, **DENIED**;

3. That Defendant's Motion to Alter or Amend the Judgment (Document No. 60), BE, and the same hereby IS, **HELD IN ABEYANCE**; and

4. That the parties must submit their figures and computations not later than *November 6, 2006.*

/s/
WILLIAM CONNELLY
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. WGC-04-994

[Filed March 31, 2006]

CYNTHIA DILLON, Plaintiff,	)
v.	)
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, Defendant.	)

ORDER OF JUDGMENT

A jury trial was conducted from March 21, 2006 through March 23, 2006.

1. The jury returned a verdict in favor of the Plaintiff and against the Defendant, awarding the Plaintiff $76,914 as lost wages. The total jury award is $76,914.

2. Judgement is entered in favor of the Plaintiff, Cynthia Dillon, and against the Defendant, The Maryland-National Capital Park and Planning

Commission, in the amount of $76,914. The Court hereby RESERVES the right to rule on any appropriate motions for prejudgment interest and an award of attorney's fees and costs.

3. Any and all prior rulings made by the Court disposing of any claims against any parties are incorporated by reference herein, and this Order shall be deemed to be a final judgment within the meaning of Federal Rule of Civil Procedure 58.

4. The case shall be administratively CLOSED.

March 31, 2006
Date

/s/
WILLIAM CONNELLY
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. WGC-04-994

[Filed March 3, 2006]

CYNTHIA DILLON,	)
Plaintiff,	)
	)
v.	)
	)
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,	)
Defendant.	)
	)

MEMORANDUM OPINION

Pending before the court and ready for resolution is Defendant's Motion *In Limine* (Docket No. 35). Plaintiff filed an Opposition (Docket No. 41) and Defendant a Reply Memorandum (Docket No. 42). No hearing is deemed necessary and the court now rules pursuant to Local Rule 105.6 (D. Md.).

The Maryland National Capital Park and Planning Commission ("Commission") asks the court to bar the admission of the following:

(1) any information regarding Ms. Dillon's alleged qualification for Family and Medical Leave Act ("FMLA") leave which was not provided to the Commission before Ms. Dillon's employment was terminated on January 17, 2003, and

(2) the medical certification form submitted with Ms. Dillon's FMLA request and any information contained therein.

With regard to issue 1, the Commission notes the bulk of information about Ms. Dillon's qualifications for FMLA leave surfaced when Ms. Dillon filed her Motion for Summary Judgment, almost two years after she was terminated from employment. Citing *Sherrod v. Philadelphia Gas Works,* No. 02-2153, 2003 WL 230709 (3d Cir. Jan. 29, 2003), the Commission argues Ms. Dillon's belated information is not pertinent to any alleged FMLA violation in this litigation.

> [T]he Commission could not be expected to act on information it did not have and that was squarely within Ms. Dillon's control. Under the circumstances, the Commission could not be said to have interfered with Ms. Dillon's FMLA rights by failing to accept a factual justification that was not provided to it until after the close of discovery in this litigation. Information that was provided for the first time after the alleged interference complained of (termination of employment) is not relevant to the determination of whether those actions constituted an interference. Obviously, such information could not have been considered by the employer in reaching the decision on the

> FMLA request on which Plaintiff rests her claim. Nor is the information relevant to the issue of whether the Commission unlawfully interfered with Ms. Dillon's claimed FMLA rights.

Def.'s Mem. Supp. Mot. Limine ("Def.'s Mem."), at 8-9.

If the court finds this new information relevant, the Commission claims the unfair prejudice and risk of confusion far outweigh any probative value.

In her Opposition Ms. Dillon contends all evidence bearing on the issues of whether her grandmother was in *loco parentis* to her, whether Ms. Dillon was "needed to care for" her grandmother, and whether her grandmother had a serious health condition under the FMLA is clearly relevant under Federal Rule of Evidence 401 and thus admissible under Federal Rule of Evidence 402 since Ms. Dillon has the burden of proof. In response to the Commission's contention that only the evidence Ms. Dillon presented before her termination is relevant, Ms. Dillon asserts,

> [T]his could only be the case if defendant were challenging whether plaintiff gave sufficient notice to defendant of her need for FMLA leave and was not challenging, additionally, that plaintiff was in fact covered by the FMLA. While any evidence provided substantially after she was terminated would likely not be relevant to show what notice plaintiff provided defendant as to her request for FMLA leave, such evidence is clearly relevant to showing that she was in fact covered by the FMLA and therefore had an

> "entitlement to the disputed leave" under the statute.

Docket No. 41, at 10.

In its Reply the Commission rejects Ms. Dillon's distinction between providing sufficient notice of her entitlement to FMLA leave and proving her entitlement to FMLA leave. The Commission claims Ms. Dillon's interpretation, in effect, eliminates the statutory requirement of sufficient notice. "Plaintiff's urged construction would place employers (particularly those acting in good faith as the Court already found the Commission to be) in the untenable position of either having to grant leave not required by the known facts or risking strict liability later based upon information withheld by the employee at the time of decision." Docket No. 42, at 2. With regard to permitting Ms. Dillon to prove her entitlement to FMLA leave with information not provided to her employer before she was terminated, the Commission asserts this would be unfair.

> It would be fundamentally unfair to effectively charge the Commission with information that was squarely within Ms. Dillon's control and that it was unable to pry out of Ms. Dillon despite repeated efforts. It would be further fundamentally unfair to permit a jury to conclude the Commission unlawfully interfered with Ms. Dillon's FMLA rights by failing to accept a factual justification that was not provided to it until after the close of discovery in this litigation, more than a year after the decision of which Plaintiff complains. Under the

> circumstances, Ms. Dillon should be estopped from now trying to use this information to claim a violation of her FMLA rights.

Id. at 3.

This is not the first time this issue has been presented to this Court. Judge Chasanow did not resolve the matter when she denied Ms. Dillon's motion for summary judgment and denied in part and granted in part the Commission's motion for summary judgment.

> [A] potentially critical question in this case is whether Plaintiff may support her claim with evidence not shared with her employer at the time leave was requested and, thus, prior to it concluding that she did not qualify for FMLA leave, or whether she will be limited only to that evidence which she provided to Defendant prior to its making its decision. Defendant suggests that Plaintiff's burden is to establish that the information provided to it *at the time it made its decision* demonstrates that her grandmother stood in loco parentis to her. However, Defendant has not cited any case law to support that assertion, and neither the statute, regulations, nor cases considered by the court speak directly to this issue. Therefore, it is not clear whether Plaintiff should be allowed to present evidence of a qualifying relationship beyond what was provided to her employer in order to meet her burden, or if she should be limited to demonstrating a qualified relationship based only on the information and

evidence provided to Defendant when requesting FMLA leave.

Dillon v. Maryland-National Capital Park & Planning Comm., 382 F. Supp. 2d 777, 786 (D. Md. 2005). Although Judge Chasanow did not need to resolve the issue at the pretrial dispositive motions stage, she recognized the necessity of revisiting the issue. *Id.* n.4. With a jury trial scheduled to commence March 21, 2006, the Commission asks this Court to revisit the issue.

Consistent with Judge Chasanow's observations, this Court, upon further review, has not found any cases addressing this precise issue. There are cases however addressing the issue of whether post-termination medical evidence is relevant and admissible.

In *McFall v. BASF Corp.*, 406 F. Supp. 2d 763 (E.D. Mich. 2005), McFall sued her employer for terminating her in violation of FMLA. While employed with BASF, McFall missed work on multiple occasions due to illness. McFall never specified the reason for her absence except to say she was "sick." On one occasion when BASF's nurse examined McFall before clearing McFall to return to work without medical restrictions, the nurse noted McFall had symptoms of an upper respiratory infection. McFall subsequently was terminated by BASF.

In her motion for summary judgment McFall claimed her absences were linked to asthma and/or bronchitis, but also due to Achilles tendinitis, migraines and hypertension. The court noted the latter

ailments were never disclosed to BASF before McFall's termination.

> The use of the word "employee" in the FMLA illuminates a significant limitation on the timing of the required notice: It must be provided *during* the employment relationship, not after the employee has been terminated. Thus, for purposes of FMLA notice, the Court must ignore Plaintiff's post-termination claims of health problems, including all of those made during her deposition and in her filings. What is relevant at this stage are Plaintiff's statements to Defendant during the course of her employment relationship.

Id. at 768 (citations omitted).

In *Frazier v. IBP, Inc.*, No. C97-0023, 1999 WL 33655745 (N.D. Iowa Feb. 2, 1999), Frazier filed a lawsuit alleging his termination of employment violated the FMLA. To substantiate his serious health condition, Frazier claimed he is entitled to rely on post-termination medical evidence showing he was suffering a serious health condition when he was discharged. "Granted, evidence of the employee's medical condition after he is terminated is relevant to whether the employee suffered from a 'serious health condition' at the time of his termination. However, the medical evidence Frazier contends supports his FMLA claim is for treatment taking place six to eight months or more after his termination and cannot be determinative." *Id.* *4 (citation omitted).

In *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109 (6th Cir. 1997), the Sixth Circuit found admissible to refute a former employee's assertion that he suffered from a serious health condition evidence that the former employee did not miss any work at his new job due to his illness nor sought medical treatment after being terminated from his previous job.

> [In this case Varity] concedes that it terminated Bauer's employment because of excessive absenteeism, and the question is whether the objective evidence establishes that Bauer had a "serious health condition," thus qualifying for protection under the FMLA. Since the plaintiff has the burden to establish the objective existence of a serious health condition, and subsequent developments are relevant to such an objective inquiry, we may consider Bauer's course of action after his employment was terminated.

Id. at 1112.

Similarly, the Seventh Circuit found post-termination medical evidence admissible and rejected defendant-appellant's assertion that the trial judge impermissibly admitted such evidence.

> According to Avon, some of the evidence supporting the verdict should not have been admitted. It objects to the details developed by diagnoses after the discharge. The district judge did not abuse her discretion in admitting this evidence. Avon cannot be charged with

> knowledge of the future, but these diagnoses also helped the jury understand how Byrne likely had been behaving at work before the discharge, and thus while Avon had time to draw appropriate inferences. That evidence bore not only on the question whether Byrne had a serious medical condition (an essential condition for FMLA leave) but also on the questions whether Avon likely knew of Byrne's need for FMLA leave and whether Byrne had been capable of giving notice himself.

Byrne v. Avon Products, Inc., 125 Fed. Appx. 704, 705 (7th Cir. 2004).

In this case, unlike the Plaintiff in *McFall,* Ms. Dillon is not attempting to present new information such as her grandmother is actually her mother and thus is a qualified family member under the FMLA. Such an assertion, post-termination, would be completely new and would not be admissible because Ms. Dillon did not give "notice" during her employment. Unlike the Plaintiff in *Frazier*, Ms. Dillon is not asking to present to the jury medical information about her grandmother's health six months or more after Ms. Dillon was terminated.

If post-termination medical evidence is relevant to whether an employee had a serious health condition at the time of his termination, *see Frazier*, by analogy, post-termination evidence is relevant to whether Ms. Dillon was qualified to take FMLA leave to care for her grandmother at the time the Commission fired Ms. Dillon. The Commission contends "Ms. Dillon never provided information clarifying her entitlement, but

instead provided information that continually moved her farther away from a qualified status." Def.'s Mem., at 10. Even if the Commission's assertion is correct, that fact does not preclude Ms. Dillon from presenting this relevant evidence. Both parties acknowledge Ms. Dillon bears the burden of proving her grandmother had a serious health condition, that Ms. Dillon was needed to care for her grandmother within the meaning of the FMLA and that Ms. Dillon was entitled to coverage under the FMLA.

With regard to the Commission's contention that the post-termination information Ms. Dillon seeks to present is unfairly prejudicial and thus should be excluded under Federal Rule of Evidence 403, the court intends to instruct the jury that the Commission had no knowledge of certain information when it terminated Ms. Dillon's employment. The court is willing to consider any other proposed limiting instructions from the Commission. For the above reasons, the Commission's request to bar the admission of any evidence regarding Ms. Dillon's qualification for leave under the FMLA which was not provided before her termination on January 17, 2003 will be denied.

The second issue concerns the medical certification form Ms. Dillon submitted in response to the Commission's request. The Commission seeks to exclude this form on multiple grounds. First, the authenticity of the medical certification form has not been legally established. Second, even if the medical certification form is authenticated, it must be excluded as inadmissible hearsay and does not qualify under any of the recognized exceptions to the hearsay rule.

Third, the information listed on the medical certification form is not based on personal knowledge. "The probative value of the document is marginal at best. It is clear from the document itself that the certification was prepared in retrospect and even at that is inaccurate." Def.'s Mem., at 11. If the court rejects all of these arguments for excluding the medical certification form, the Commission claims its prejudicial value far outweighs its probative value.

In her Opposition Ms. Dillon asserts, "the medical certification filled out by the grandmother's treating doctor is being used to show what notice of potential FMLA coverage plaintiff provided to defendant at the time of the termination (rather than whether the statements contained in the document are true or not). . . . Since the exhibit is being provided to show notice and not for the truth of the matter asserted therein, it is not hearsay pursuant to Rule 801." Docket No. 41, at 11. If however Ms. Dillon elects to use the document to prove the truth of the matter asserted, Ms. Dillon contends the medical certification form is admissible under Federal Rules of Evidence 803(4) [Statements for purposes of medical diagnosis or treatment] and 803(6) [Records of Regularly Conducted Activity].

In its Reply the Commission notes, presuming the medical certification form is admissible as non-hearsay evidence to establish Ms. Dillon provided "notice" about her grandmother's serious health condition, "it would not meet her distinct burden to meet her 'entitlement' burden of proof on the 'serious health condition' and 'needed to care for' issues that require the expert conclusion of an appropriate medical

provider. Therefore, if the medical certification form is not to be offered for its truth, summary judgment should be entered in favor of the Commission at this juncture." Docket No. 42, at 4-5 (footnote omitted). Additionally, the Commission rejects Ms. Dillon's argument that the medical certification form qualifies as a hearsay exception per Federal Rules of Evidence 803(4) and 803(6). The medical certification form does not meet Rule 803(4) because it is a form completed by the medical provider for employment purposes, not information gathered from a patient seeking medical treatment. Regarding Rule 803(6) the medical certification form is not a document generated by the medical provider nor used on a regular basis by the medical provider to make a record.

> The physician did not prepare the record as part of treating the patient, does not rely on it in treating the patient, nor is it essential to ensuring that the patient receives proper medical care. Neither the physician, nor his/her staff, have a duty to prepare the form for the benefit of the patient's medical treatment and diagnosis. Instead of being produced as part of a medical duty to the patient, the certification form was only completed due to the request of a third party facing the prospect of losing her job.

Docket No. 42, at 7.

The court finds the medical certification form does not qualify as an exception to the hearsay rule either under Rule 803(4) or Rule 803(6). Regarding authentication of the form, it is the court's understanding that Ms. Dillon intends to call Dr.

Nesbeth who completed the form. The Commission objects because Ms. Dillon did not disclose this witness until January 3, 2006 and objects to Dr. Nesbeth's testimony. Since the Commission is challenging the authenticity of the medical certification form, Ms. Dillon has the burden and is permitted to authenticate through the testimony of a witness with knowledge. Fed. R. Evid. 901(b)(1). If Ms. Dillon intends to present the medical certification form for non-hearsay purposes, the Commission would object on the ground that Ms. Dillon fails "to meet her 'entitlement' burden of proof on the 'serious health condition' and 'needed to care for' issues that require the expert conclusion of an appropriate medical provider." Document No. 42, at 4-5. The court finds this is a non-issue since Ms. Dillon intends to call Dr. Nesbeth. If the doctor does not testify, the court is willing to reconsider this issue, if necessary, at trial. Lastly, the Commission claims any probative value of the medical certification form is outweighed by prejudice. It is undisputed the Commission provided the medical certification form to Ms. Dillon and requested she have a medical provider complete it. The court finds the probative value outweighs any prejudice. For the reasons stated, the court will deny in part and grant in part the Commission's request to bar the admission of the medical certification form and any information contained therein.

For the foregoing reasons, an Order will be separately entered denying in part and granting in part Defendant's Motion *In Limine*.

March 3, 2006
Date

/s/
WILLIAM CONNELLY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. WGC-04-994

[Filed March 3, 2006]

CYNTHIA DILLON, Plaintiff,	)
v.	)
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, Defendant.	)

ORDER

In accordance with the foregoing Memorandum Opinion, IT IS, this 3rd day of March, 2006, by the United States District Court for the District of Maryland, ORDERED:

That Defendant's Motion *In Limine* (Docket No. 35), BE, and the same hereby IS, DENIED IN PART and GRANTED IN PART.

/s/
WILLIAM CONNELLY
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. DKC 2004-0994

[Filed August 18, 2005]

CYNTHIA DILLON	)
	)
v.	)
	)
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION	)

MEMORANDUM OPINION

Presently pending and ready for resolution in this action brought under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*, are the cross-motions for summary judgment by Plaintiff Cynthia Dillon (Paper 13) and Defendant Maryland-National Capital Park and Planning Commission ("MNCPPC") (Paper 16). The issues have been fully briefed and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the following reasons, Plaintiff's motion for summary judgment will be denied, and Defendant's motion for summary judgment will be denied in part and granted in part.

I. Background

Unless otherwise noted, the following facts are uncontroverted. Plaintiff Cynthia Dillon was hired by Defendant MNCPPC in 1989 as an administrative aid. In 1995, she was transferred to the Payroll Section of Defendant's Finance Department. In August 2002, Plaintiff requested three weeks leave, to be taken from December 12, 2002 through January 2, 2003, in order to take a family vacation with her husband and children to Jamaica, where several of Plaintiff's relatives lived. Plaintiff admits that she purchased the airline tickets before she submitted her request for leave, and, thus, before her request had been approved. *See* Paper 13, Ex. 1 ("Plaintiff's Decl."), ¶7. In response to Plaintiff's request, her second-level supervisor, Ms. Deloris Kirby, informed her that a leave of three weeks during that time of the year would not be possible. *Id.*, ¶8; see also Paper 13, Ex. 2 (8/21/02 Kirby e-mail).

On November 6, 2002, Plaintiff submitted a second request for three weeks leave for the same time period. In response to her second request, Plaintiff's third-level supervisor, Ms. Mary Williford, again informed Plaintiff that her leave request for three weeks in December/January could not be approved due to the nature of the Payroll Department's work program at that time of the year. *See* Paper 13, Ex. 3 (11/7/02 Williford e-mail). However, Ms. Williford suggested that if Plaintiff desired, she could submit a leave request for December 12 through December 20, 2002, which Ms. Williford would recommend for approval. In an e-mail reply, Plaintiff provided why it was important to her that her request be approved:

> Mary, unfortunately, I will incur a penalty if I change my ticket. This vacation involve[s] my family. In June of this year I was to go and didn't. Unfortunately, my uncle who was very ill pass[ed] during that same timeframe [sic] and I did not get to go.
>
> Due to the fact that summer is a very difficult time to get three weeks off to spend time with my family, we thought December would be the very next best time. This time off does not just involve me, it involve[s] my family.

See id. In addition to these reasons, Plaintiff wrote:

> My grandmother is not in the best of health and is asking for me. I really don't want to go visit with her grave (as I will have to do my uncle's), I want to visit with my grandmother (not that any of us have any control over death, I could very well go before her), that is something I just don't want to live with.

Id.

That same day, Plaintiff met with Defendant's Secretary-Treasurer and head of its Finance Department, Ms. Patricia Barney, in order to discuss her leave request. In an affidavit, Ms. Barney states that Plaintiff cited several reasons for requesting three weeks leave, including that her family had already planned a Christmastime vacation in Jamaica, that they had already purchased airline tickets, that she would incur a penalty if she altered her flight itinerary, and that she wanted to visit her

grandmother. *See* Paper 16, Ex. 1 ("Barney Aff."), ¶8. Ms. Barney also attests that Plaintiff stated that she would be taking the requested three weeks leave regardless of whether Defendant approved it. *Id.*, ¶10. At that point, Ms. Barney informed Plaintiff that if she stayed beyond the period approved, she would be absent without approved leave (AWOL) and would face termination. *Id.*[1] In lieu of granting Plaintiff's full request, Ms. Barney informed her that she could approve either a three-week leave request for a different time period, or a shorter amount of leave for December, specifically December 12 through December 20, 2002. After inquiring about transferring out of the Payroll Office, which was not possible at that time, Plaintiff submitted a request for leave for the time period offered by Ms. Barney, which was subsequently approved. *See* Plaintiff's Decl., ¶12; Barney Aff., ¶12.

On December 12, 2002, as scheduled, Plaintiff and her family flew to Jamaica. Upon arriving, Plaintiff immediately visited her grandmother, who lived with Plaintiff's aunt. Plaintiff's Decl., ¶14; Paper 16, Ex. 2 ("Plaintiff's Dep.") at 17-18. That same day, Plaintiff learned that her grandmother had sustained a "small stroke" a few days earlier. Plaintiff's Dep. at 18. Moreover, upon seeing her grandmother's living conditions, which Plaintiff described as "dilapidated,"

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[1] Plaintiff does not dispute that she made such a declaration to Ms. Barney, or that Ms. Barney responded with a warning. However, Plaintiff attests that she does "recall telling [Ms. Barney] that [her] grandmother was very ill . . . and that [she] was very close to her because she had raised [Plaintiff] as a child." Plaintiff's Decl., ¶11. She further attests that she "needed to spend some time devoted to taking care of her." *Id.*

she decided it was necessary for her to secure another living arrangement for her. *Id.* at 21-23.

On Thursday, December 19, 2002, at 6:35 p.m., seven days after first arriving in Jamaica, Plaintiff sent an e-mail to Ms. Barney that stated in part, "I am requesting an extension of sick leave because my grandma is very ill and I am in the process of finding a home for her." Plaintiff's Decl., ¶16. The following morning, December 20, Ms. Barney responded via e-mail as follows:

> Cynthia,
> I am sorry to hear about your grandmother; however, as was indicated when you requested your leave, we were unable to approve more than the 12/12 - 12/20 time period due to work program demands. We had offered that you visit at a different time of year, if you desired more time. You agreed to the time approved. If that time is exceeded, you will be absent without leave. As we discussed, that would result in termination of your employment. I am truly sorry that I cannot approved [sic] your request.

See Barney Aff., Attach. 1. Thus, under the original approved leave request, Plaintiff was due to return to work the following Monday, December 23, 2002.

On that Monday, Plaintiff failed to return to work. Rather, Plaintiff responded via e-mail from Jamaica. In her e-mail, Plaintiff stated that when she left for Jamaica she "had no idea the condition" her grandmother was in, that she felt "the need to find a home for [her] grandmother," and that she was "trying

to place her in a home. " *See* Barney Aff., Attachs. 2-5. She also stated in this e-mail that her "grandmother actually raised [her]," and that she felt "the need to find her a safe home." *Id.* At this point, she requested that Ms. Barney check to see if Defendant's Merit Rules would cover an extension of time to take care of her grandmother. *Id.*

That same day, Ms. Barney responded to Plaintiff's latest e-mail, recounting the discussion they had had in November concerning Plaintiff's original leave request. Ms. Barney reminded Plaintiff that when Plaintiff stated she was "going to take [her] requested annual leave even if it wasn't approved," Ms. Barney informed her that she would be AWOL and would lose her job. She also indicated that although Plaintiff stated at that time she was "close to [her] grandmother," she did not mention that "she had raised [Plaintiff.]" *Id.* To that assertion, Ms. Barney informed Plaintiff that she believed the Merit Rules "provide for sick leave up to 80 hours for immediate family described as a spouse, a child or parents." She further advised Plaintiff that although she "did not know if this could be applied to [Plaintiff's] grandmother, if she raised [Plaintiff]," she should "contact the Personnel Office to determine that answer." *Id.* She concluded her e-mail by informing Plaintiff that her status remained AWOL, that the Merit Rules provide for termination if the abandonment continued for a period of three days, but that she would "consider any information" Plaintiff could provide before making an ultimate decision. She also reiterated that Plaintiff "may wish to contact the Personnel Office for additional guidance." *Id.*

Although Ms. Barney sent the above referenced e-mail on Monday, December 23, Plaintiff did not respond until Saturday, December 28, 2002. In another e-mail sent from Jamaica, Plaintiff stated, apparently in response to Ms. Barney's comment regarding Defendant's Merit Rules and its applicability to a grandparent, "And yes, I grew up with my grandmother." *Id.*, Attachs. 2-5. Plaintiff also sent this e-mail to Ms. Trudye Johnson, Defendant's Executive Director. *See id.* Of Ms. Johnson, Plaintiff requested that she look into the matter of whether the Merit Rules would cover her situation. *Id.* She also indicated in her e-mail that she was making final arrangements for her grandmother and that should could be back in the office by January 2, 2003. *Id.* Because this e-mail was sent on a Saturday, Ms. Barney did not receive it until the next work day, Monday, December 30, 2002.

Plaintiff returned from Jamaica on December 31, 2002. On January 3, 2003, Ms. Barney sent a letter to Plaintiff at her home, both by courier and first-class mail, notifying her of Defendant's intent to terminate her employment. *See id.*, Attach. 6 ("Notice Letter"). In this five-page letter, Ms. Barney thoroughly explained the basis for Defendant's decision, which, in essence, was Plaintiff's absence from work well beyond the approved leave time. It is in this letter that rights under the Family and Medical Leave Act, which is at the heart of this action, were first explicitly mentioned. Ms. Barney wrote:

> In accordance with The Merit System Rules and Regulations, . . . you have five (5) work days from the receipt of this notice within which to

> provide me with your response. It may be either oral or written and will be considered before any final action is taken. In addition, if you contend that your absence is covered for any reason under the Family and Medical Leave Act, you should submit all of the Commission FMLA forms that I have enclosed. In this case, you should also explain in reasonable detail whether, and, if so, when and how your grandmother actually stood in the role of your parent during childhood.

Id. at 5. In addition, Ms. Barney informed Plaintiff that should she "find that [Plaintiff's] response to this letter is satisfactory, [she would] not be dismissed." *Id.*

The following day, Plaintiff sent a letter to Ms. Barney, in which she indicated that she was in the process of completing the FMLA forms, one of which was a health certification form that Plaintiff had sent to Jamaica to have completed. *Id.*, Attach. 7. With respect to her relationship with her grandmother, Plaintiff wrote:

> I am the first grandchild for [her]. During my childhood my grandmother was always instrumental in my life. My mother was around but I was always with my grandmother. I slept with her, always in a fight with my aunt to sleep directly [with] my grandmother as she always slept at the edge of the bed. My grandmother fed me, take me to church on Saturdays, and comb my hair, as I stated she played a major role in my upbringing.

> In the payroll office I have always spoken of my grandmother and when I ask for the vacation, the primary reason was to see my grandmother.
>
> I have always taken care of my grandmother without asking others what they are doing, I am always obligated to take care of her. My grandmother was always in my life from childhood during my first pregnancy, after, and always. There is nothing too good that I have that I would not give to my grandmother.

Id. Shortly thereafter, on January 10, 2003, Ms. Barney requested that Plaintiff meet with her in her office. Ms. Barney avers that the purpose of this meeting was to give Plaintiff another opportunity to fully explain the relationship between herself and her grandmother in order to determine if her grandmother "'stood in the place of' her parents so as to be a legally recognized relationship under the FMLA." Barney Aff., §24. According to Ms. Barney, Plaintiff indicated at this meeting that she felt a sense of duty to help her grandmother because she had played a role in her childhood, and that "everyone [had] helped everyone" when Plaintiff was growing up. *Id.* Ms. Barney then asked Plaintiff if she had any other information to support her position, which Plaintiff indicated she did not. *Id.*

No decision was made at this meeting, but shortly thereafter, Ms. Barney concluded that based on the information provided by Plaintiff, her relationship with her grandmother did not qualify her for leave

under the FMLA. On January 17, 2003, Plaintiff received a letter informing her of Defendant's final decision. See Paper 16, Attach. 8 ("Final Dismissal Letter").

In pertinent part, the letter stated:

> In an effort to afford you every benefit of the doubt, we have also considered whether your Grandmother's unfortunate health situation qualifies for consideration under the FMLA. Generally, the FMLA normally does not apply with respect to leave occasioned by a grandparent's health problem. The exception to this general rule arises when a grandparent is recognized legally as the employee's parent. Your letters and statements make it clear that this simply is not the case and the FMLA has no application in [sic] here. While I have every reason to believe that you are close to your Grandmother and spent a great deal of time together during your childhood, this is simply not the sort of relationship covered under the law.

Id. Plaintiff subsequently appealed Ms. Barney's decision to Defendant's Merit System Board, which is comprised of outside personnel professionals. Barney Aff., ¶28. On July 15, 2003, a full administrative evidentiary hearing was held on the matter, and on August 20, 2003, the Board denied Plaintiff's appeal.

II. Standard of Review

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1987). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Catawba Indian Tribe of South Carolina v. State of S. C.*, 978 F.2d 1334, 1339 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *See U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his

or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324. However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 (4th Cir.), *cert. denied*, 522 U.S. 810 (1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

The inquiry involved on a summary judgment motion "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson*, 477 U.S. at 252. Where the movant also bears the burden of proof on the claims at trial, as Plaintiff here, she "must do more than put the issue into genuine doubt; indeed, [she] must remove genuine doubt from the issue altogether." *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 164 (4th Cir. 1999) (internal quotation omitted), *cert. denied*, 530 U.S. 1204 (2000); *see also Proctor v. Prince George's Hosp. Ctr.*, 32 F.Supp.2d 820, 822 (D.Md. 1998) (evidentiary showing by movant "must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party") (internal quotation and italics omitted). Summary judgment will not be appropriate unless the movant's evidence supporting the motion "demonstrate[s] an absence of a genuine dispute as to every fact material to each element of the movant's claim and the non-

movant's response fails to raise a genuine issue of material fact as to any one element." *McIntyre v. Robinson*, 126 F.Supp.2d 394, 400 (D.Md. 2000) (internal citations omitted).

When faced with cross-motions for summary judgment, as in this case, the court must consider "each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (internal quotation omitted); *see also havePower, LLC v. Gen. Electric Co.*, 256 F.Supp.2d 402, 406 (D.Md. 2003) (citing 10A Charles A. Wright and Arthur R. Miller, *Federal Practice & Procedure* § 2720 (3d ed. 1983)). The court reviews each motion under the familiar standard for summary judgment, *supra*. The court must deny both motions if it finds there is a genuine issue of material fact, "[b]ut if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A *Federal Practice & Procedure* §2720.

III. Analysis

Plaintiff contends that Defendant interfered with her FMLA rights when it "den[ied] her the leave extension requested" in her December 19, 2002 e-mail, *see* Paper 13 at 14, which led to her termination for being "AWOL for the very time period that Plaintiff was seeking FMLA leave." *See id.* at 16.[2] In support of

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[2] Although both parties devote a few pages in their respective briefs to the standards applicable to an FMLA retaliation charge,

her motion for summary judgment, she argues that it is undisputed that she was entitled to leave under the FMLA in order to take care of her ailing grandmother, whom she asserts "basically raised [her] as a child." *See* Plaintiff's Aff., ¶7. Defendant has filed a cross-motion for summary judgment, arguing that: (1) Plaintiff's grandmother does not qualify as a "parent" under the FMLA; (2) Plaintiff failed to provide adequate notice of her need for FMLA leave; (3) Plaintiff's request was not made "in order to care for" her grandmother's serious health condition; and (4) Plaintiff was terminated for reasons unrelated to her FMLA request. Defendant also contends that even if it is not entitled to summary judgment on Plaintiff's FMLA claim, it is entitled to partial summary judgment as to Plaintiff's request for liquidated

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as Defendant correctly notes, "no retaliation claim is pleaded in the Complaint." *See* Paper 16 at 26 n.7; Paper 1, ¶17 (alleging that "Defendant's termination of Plaintiff . . . violated the FMLA's provisions at 29 U.S.C. Sec. 2615(a) (1) [which provide that] [i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise, any right provided under [the FMLA]"); *see also Wheeler v. Pioneer Developmental Services, Inc.*, 349 F.Supp.2d 158, 169 (D.Mass. 2004) (finding that "[h]aving qualified and applied for FMLA leave, [the plaintiff] was entitled to receive it," so that "[w]hen [the defendant] discharged [her] from her employment for taking the leave [and thereby being deemed absent from work without authorization,] it interfered with her rights under the FMLA"); *Miller v. AT & T*, 60 F.Supp.2d 574, 578 (S.D.W.Va. 1999) (*Miller I*) (construing Plaintiff's termination claim under the FMLA as one for unlawful denial and interference and not retaliation where the plaintiff was terminated for excessive absences accrued when the defendant erroneously concluded that they did not qualify as FMLA leave), *aff'd*, 250 F.3d 820 (4th Cir. 2001).

damages. For the following reasons, Plaintiff's motion for summary judgment will be denied, and Defendant's motion will be denied in part and granted in part.

A. Whether Plaintiff's grandmother qualifies as her "parent" under the FMLA

"[T]he FMLA creates both substantive and proscriptive rights." *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005). The substantive rights include an employee's right to take up to twelve weeks of unpaid leave in any one-year period in order to care for a parent who has a serious health condition. 29 U.S.C. § 2612 (a) (1) (C). "The proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the Act." *Taylor*, 415 F.3d at 364. Under the FMLA, "parent" is defined as "the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter." 29 U.S.C. § 2611(7). Although the statute does not define the term "in loco parentis," the relevant Department of Labor regulations provide, "Persons who are 'in loco parentis' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary." 29 C.F.R. § 825.113 (c) (3).

As the plain language of the FMLA does not authorize FMLA leave for the care of grandparents, Plaintiff could only be entitled to FMLA leave to care for her grandmother if she stood in loco parentis to

Plaintiff. *See Krohn v. Forsting*, 11 F.Supp.2d 1082, 1092 (E.D.Mo. 1998).[3] Thus, Plaintiff bears the burden of putting forth sufficient evidence demonstrating that her grandmother qualifies as her "parent" under the FMLA. *Cf. Rhoads v. F.D.I.C.*, 257 F.3d 373, 384 (4th Cir. 2001) ("[T]he district court correctly required [the plaintiff] to prove that she was afflicted with an FMLA-qualifying condition, because otherwise she did not have any right under the Act with which her employer could have interfered.") (citing *Diaz* v. Fort *Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997) (holding that FMLA interference suits are to be resolved "by asking whether the plaintiff has established, by a preponderance of the evidence, that he is entitled to the benefit he claims")).

In response to Plaintiff's assertion in her December 23 e-mail that her grandmother "raised" her, Defendant sought more information from Plaintiff that might demonstrate how her grandmother "actually stood in the role of [her] parent during childhood." *See* Notice Letter. In support of her assertion, Plaintiff wrote:

> I am the first grandchild for [her]. During my childhood my grandmother was always instrumental in my life. My mother was around

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[3] Although the court in *Krohn* stated the requirement that a plaintiff would only be entitled to FMLA leave to care for her grandmother if the grandmother stood in loco parentis to her, it did not have to address the issue, or consider what kinds of facts tend to prove such an entitlement because the plaintiff "presented no evidence and indeed [did] not argue that her grandmother stood in loco parentis to her." *Krohn*, 11 F.Supp.2d at 1092.

> but I was always with my grandmother. I slept with her, always in a fight with my aunt to sleep directly [with] my grandmother as she always slept at the edge of the bed. My grandmother fed me, take me to church on Saturdays, and comb my hair, as I stated she played a major role in my upbringing.
>
> . . . .
>
> In the payroll office I have always spoken of my grandmother and when I ask for the vacation, the primary reason was to see my grandmother.

Paper 16, Attach. 7. In addition, for purposes of this litigation, Plaintiff made the following declaration:

> I was very close to my grandmother because she had basically raised me as a child. My mother was only 16 years old and still living at home when she was pregnant with me, and my grandmother was the one who financially provided for both of us. I was much closer to my grandmother than my mother during my formative years and slept in the same bed with her for the first 12 years. With the exception of spending a year living with my dad (when I was about 4 years old) and then while attending high school, when my mother and I lived separately from my grandmother, I spent my entire growing up period with my grandmother, who was the one who financially provided for me. I also returned to live with her after I too became pregnant at age 16 when my mother kicked me out of her residence because of my

> pregnancy. As the latter incident evinces, my grandmother was the one who I relied upon most for emotional and financial support as I was growing up and I love her as dearly as if she were my own mother.

Plaintiff's Decl., ¶7. This declaration, however, dramatically expands the information provided to Defendant during the time Plaintiff was seeking FMLA leave. Defendant contends that "the information supplied in support of her request did not demonstrate that her grandmother qualified as her 'parent' within the meaning of the FMLA," and that it was "devoid of facts demonstrating that her grandmother 'stood in place of' her mother, particularly in light of her mother's admitted presence in the home." *See* Paper 16 at 11, 17.

Because Plaintiff relies on information not previously presented to her employer, a potentially critical question in this case is whether Plaintiff may support her claim with evidence not shared with her employer at the time leave was requested and, thus, prior to it concluding that she did not qualify for FMLA leave, or whether she will be limited only to that evidence which she provided to Defendant prior to its making its decision. Defendant suggests that Plaintiff's burden is to establish that the information provided to it at *the time it made its decision* demonstrates that her grandmother stood in loco parentis to her. However, Defendant has not cited any case law to support that assertion, and neither the statute, regulations, nor cases considered by the court speak directly to this issue. Therefore, it is not clear whether Plaintiff should be allowed to present

evidence of a qualifying relationship beyond what was provided to her employer in order to meet her burden, or if she should be limited to demonstrating a qualified relationship based only on the information and evidence provided to Defendant when requesting FMLA leave. However, even if Defendant's position is correct, and, therefore, Plaintiff must prove that the information provided to Defendant at the time it made its decision demonstrates her entitlement to FMLA leave, the court concludes that that evidence is enough to create a triable issue as to whether she was entitled to FMLA leave in order to care for her grandmother. Conversely, even with the new information provided by Plaintiff in her declaration and deposition testimony, the evidence is not so conclusive as to require a finding, as a matter of law, that Plaintiff's grandmother stood in loco parentis to her.[4]

"The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." *Niewiadomski* v. *United States,* 159 F.2d 683, 686 (6th Cir. 1947). Black's Law Dictionary defines the phrase "in loco parentis" as "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights,

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[4] Although the court need not decide at this stage on what evidence Plaintiff may rely in order to meet her burden, as this case proceeds, it will become necessary to revisit this issue.

duties, and responsibilities." *Black's Law Dictionary* 787 (6th ed. 1990). The mere fact of being a grandparent does not necessarily give rise to in loco parentis status. 28 Am. Jur.2D *Proof of Facts* 545, §7 (1981). Indeed, a grandparent may assume the care and custody of a grandchild under circumstances which are consistent with the existence of the natural relationship between parent and child without any intention to sever that relationship. *Id.* (citing *Strunk v. United States*, 80 F.Supp. 432 (E.D.Ky. 1948), *Sutton v. Menges*, 44 S.E.2d 414 (Va. 1947)).

"The key in determining whether the relationship of in loco parentis is established is found in the *intention* of the person allegedly in loco parentis to assume the status of a parent toward the child." 28 Am.Jur.2D *Proof of Facts* 545, §2. The intent to assume such parental status can be inferred from the acts of the parties. *Id.* "Other factors which are considered in determining whether in loco parentis status has been assumed are (1) the age of the child; (2) the degree to which the child is dependent on the person claiming to be standing in loco parentis; (3) the amount of support, if any, provided; and (4) the extent to which duties commonly associated with parenthood are exercised." *Id.*

Here, Plaintiff's evidentiary support for her proposition that she has established as a matter or law an in loco parentis relationship with her grandmother is not "sufficient for the court to hold that no reasonable trier of fact could find other than for" Plaintiff on this issue. *See Proctor*, 32 F.Supp.2d at 822. However, as stated above, she has put forth enough at this stage to create a genuine issue of

material fact as to whether her grandmother stood in loco parentis to her. Not only had Plaintiff informed Defendant that her grandmother had "raised" her as a child, but she had also informed it that her grandmother "fed" her and that she slept with her, indicating that Plaintiff indeed resided with her grandmother during her childhood and that her grandmother provided certain necessities for her. Ms. Barney also attests that Plaintiff told her during their January 10 meeting prior to Defendant making its final decision that her grandmother "played a role in Ms. Dillon's childhood, and that 'everyone [had] helped everyone' when [Plaintiff] was growing up." Barney Aff., ¶25. Although these statements may not undisputedly demonstrate that her grandmother stood in loco parentis to her, the court cannot say, as a matter of law, that they fall short. The definitions of the term "in loco parentis" are often context specific, and no court–or regulation–has defined the term exhaustively. For some purposes, the presence of a biological parent in the home may foreclose another from holding the status of "in loco parentis." But for others, such as this case, the presence of Plaintiff's mother in the home is not fatal to Plaintiff's claim. In that home, as Plaintiff describes it, it is possible that her grandmother also stood "in loco parentis" at least for some portion of Plaintiff's childhood. Neither the language of the FMLA, nor the relevant regulations, put a minimum time requirement on the status. On the other hand, Plaintiff's mother was present and there is no evidence that she abandoned her role as a parent. While Plaintiff s grandmother provided shelter and financial support, the tasks described by Plaintiff may fall somewhat short of taking on a parental role.

Congress made clear that one of the purposes of the FMLA was "to balance the demands of the workplace with the needs of families, . . . and to promote national interests in preserving family integrity." 29 U.S.C. § 2601 (b) (1). Although Plaintiff has not removed all doubt from the issue, she has put forth sufficient evidence to create a triable issue as to whether the information provided to Defendant, or that provided in discovery, demonstrates a relationship that falls within the ambit of the rights accorded under the FMLA. Thus, neither party is entitled to summary judgment on this issue and both motions on this issue will be denied.

B. Whether Plaintiff provided timely notice

Defendant also moves for summary judgment on the grounds that Plaintiff's request for leave under the FMLA was not timely, thus, precluding her from asserting any rights under the Act. Although the FMLA requires employees to notify their employers of the need for foreseeable leave, 29 U.S.C. § 2612 (e) (1), the act itself does not contain a notice requirement for unforeseeable leave. The regulations, however, provide that "[w]hen the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable." 29 C.F.R. § 825.303 (a).[5] It is

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[5] Even when the need for leave is foreseeable, thereby ordinarily requiring an employee to provide at least 30 days notice, "[if 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must

expected that the employee "will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances . . . ." *Id.* Moreover,

> [t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee . . . will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

Id. § 825.303(b); *see also Rhoads*, 257 F.3d at 382-83. "The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for [an FMLA-qualifying need.]" *Manual v. Westlake Polymers Corp.*, 66 F. 3d 758, 764 (5th Cir. 1995); *see also Brohm v. JH Props., Inc.*, 149 F.3d 517, 523 (6th Cir. 1998); *Darboe v. Staples, Inc.*, 243 F.Supp.2d 5, 17 (S.D.N.Y. 2003).

Here, Plaintiff has put forth sufficient evidence to create a genuine issue as to whether she timely imparted enough information to Defendant to

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be given as soon as practicable." 29 C.F.R. § 825.302 (a). "'As soon as practicable' means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case." *Id.* § 825.302 (b).

reasonably apprise it of her request for additional time off to take care of her ailing grandmother. Indeed, after Plaintiff informed Defendant that her grandmother was in worse medical condition than she had first anticipated, and that she had "actually raised [her,]" Defendant, on its own initiative, informed Plaintiff that her request may qualify as covered leave under either its Merit Rules or the FMLA. Although it initially denied Plaintiff's request for an extension of leave, which caused her to be AWOL between December 23, 2002 and January 1, 2003, *see* Notice Letter at 4, Defendant gave Plaintiff an opportunity to demonstrate that her absences qualified under the FMLA before ultimately terminating her on January 17. Together with the Notice Letter, Ms. Barney provided FMLA request forms for Plaintiff to complete and submit "if [she] contend[ed] that [her] absence [was] covered for any reason under the Family and Medical Leave Act." *See id.* at 5. Ms. Barney also indicated that if she found Plaintiff's "response to this letter . . . satisfactory," Plaintiff "[would] not be dismissed." *Id.* It is undisputed that Plaintiff submitted these forms, as well as met with Ms. Barney, before she was terminated. Ultimately, however, Defendant concluded that based on the information provided by Plaintiff, she was not entitled to FMLA leave, and her employment with Defendant was terminated. *See* Final Dismissal Letter. Thus, the evidence creates a factual issue as to whether Plaintiff imparted to Defendant information "sufficient to reasonably apprise it of the employee's request to take time off for [an FMLA-qualifying need.]" *Manual,* 66 F. 3d at 764. Accordingly, Defendant's contention that Plaintiff did not timely assert her FMLA rights is

simply unavailing, and its motion for summary judgment on this issue will be denied.[6]

C. Whether Plaintiff's request was made "in order to care for" her grandmother's serious health condition

Defendant also moves for summary judgment on the basis that Plaintiff has put forth no evidence that her grandmother's alleged serious health condition was the reason she requested an extension of leave. Paper 16 at 22. As mentioned above, the FMLA entitles certain eligible employees 12 workweeks of leave "[i]n order to care for" a parent who has a serious health condition. 29 U.S.C. § 2612 (1) (D). The Act provides that an employer may require that a request for leave in order to care for a parent "be supported by a certification issued by the health care provider of the . . . parent . . . ." 29 U.S.C. § 2613(a). The certification is sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the knowledge of the health care provider regarding the condition, and "a statement that the eligible employee is needed to care for the . . . parent and an estimate of the amount of time that such employee is needed." *Id.* § 2613 (b) (1) - (4) (a).

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[6] Although Plaintiff moved for summary judgment, her motion dealt exclusively with the issues of her grandmother's relationship with her and her request for liquidated damages. She has not attempted to argue that, as a matter of law, the court must find that she provided adequate notice. In any event, such an argument would fail.

In addition, the relevant Department of Labor regulations provide:

> (a) The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.
>
> (b) *The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.*

29 C.F.R. § 825.116(a)-(b) (emphasis added).

Defendant's argument is less about whether Plaintiff's grandmother actually had a serious health condition and more about whether that condition was the reason for Plaintiff's extended leave request. In other words, Defendant asserts that Plaintiff did not seek an extension of leave "in order to care for" her suffering grandmother's serious health condition. Although Defendant concedes in its brief that in December of 2002, Plaintiff "identified the need to

secure an assisted living environment for her grandmother . . . as the reason for needing additional time," *see* Paper 16 at 22, it points to the following exchange between Defendant's counsel and Plaintiff during her deposition as undermining her position:

> Q. You had referred to seeking an assisted living arrangement for your grandmother while you were in Jamaica; is that correct?
>
> A. Yes.
>
> Q. You had referenced - had you observed an environment where your grandmother was living that you didn't find acceptable?
>
> A. Right.
>
> Q. That's correct?
>
> A. Correct.
>
> Q. What about the environment was unacceptable in your eyes?
>
> A. It's just that the living conditions wasn't what I liked for her.
>
> Q. What about the living situation wasn't what you liked?
>
> A. The situation where she was living wasn't too healthy of an environment for her and I need[ed] to move her out of that environment.

Q. What about the environment was unhealthy in your estimation?

A. It is just that the condition wasn't right. The setting wasn't right. It was of a dilapidated condition, then, in other words.

Q. So you weren't satisfied with the house?

A. Right.

Q. And was that what caused you to seek another living arrangement for her?

A. Yes.

Q. Did you ultimately secure another living arrangement for her?

A. Yes, we did. My aunt advised me of some place. We did, but I had to scrap that.

Q. And what was the living arrangement that you had identified?

A. It was a better arrangement where my aunt would go to the same place where my grandmother would be and a better setting.

Q. From what - a nicer house?

A. Right.

Plaintiff's Dep. at 21-23.

Defendant contends this testimony demonstrates that "the purported purpose of the extended leave was, at most, to obtain better living accommodations for her grandmother, which, while laudable, is not a sufficient basis for leave under the FMLA." Paper 16 at 24. It asserts that Plaintiff has failed to demonstrate a nexus between her grandmother's health condition and the need to find her an alternative living arrangement. *Id.* The court disagrees. Plaintiff testified in her deposition that she believed the risks associated with her grandmother's then-living conditions were greater since her stroke on December 9. Plaintiff's Dep. at 32. She stated that she was concerned about the ability and need for other people to observe her grandmother after the stroke, and was seeking an arrangement where more people would be around to observe her condition. *Id.* at 33. In her declaration, Plaintiff avers that she spent her "entire time in Jamaica attending to [her] grandmother's needs" and that "[her] aunt and [she] were actively looking for a place where she could stay with better facilities and with more people available to keep an eye on [her.]" Plaintiff's Decl., ¶14. She stated that she "immediately recognized that [she] had to move [her] grandmother to better living conditions-at a minimum, a place with an indoor toilet and with more people available to assist her." *Id.*, ¶15.

Moreover, along with the FMLA forms that Plaintiff submitted to Defendant was a medical certificate from her grandmother's health care provider that stated she suffered a "small stroke" days before Plaintiff arrived, and that she would be incapacitated for approximately two to three weeks. *See* Paper 13, Ex. 5. The certificate provided that she would require "assistance for basic medical or personal

needs or safety or for transportation" during this period of incapacity. *Id.* Although Defendant objects to the portion of the certificate indicating that Plaintiff "will need to look after her and find a caregiver" as being outside the treating physician's personal knowledge, the certificate, nonetheless, states all the information explicitly provided for in § 2613(b). Even absent this latter portion of the certificate, however, Plaintiff's deposition and declaration provide enough evidence to create a factual dispute as to whether Plaintiff's request for a leave extension was in fact "in order to care for" her grandmother whom she asserts, and the medical certificate confirms, had a "serious health condition." Although a jury may find that Plaintiff's request was not "in order to care for" her grandmother's serious health condition, she has created a triable issue as to this element.[7] Accordingly, Defendant's motion for summary judgment on this ground will be denied.

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[7] Defendant also makes much of the fact that Plaintiff's aunt (the grandmother's daughter) lived with Plaintiff's grandmother both before and after her visit, and that she also cared for the grandmother's medical and other needs. Plaintiff's argument suggests that because the aunt was also present, Plaintiff was not needed to care for her grandmother. However, the regulations specifically provide that the term "needed to care for" includes situations where the employee may be needed to fill in for others who are caring for the family members. 29 C.F.R. § 825.116(b). Thus, her aunt's presence does not necessarily preclude Plaintiff from arguing that she was also "need[ed] to care for" her grandmother.

D. Whether Plaintiff was terminated for reasons unrelated to her FMLA request

Defendant also moves for summary judgment on the basis that Plaintiff was terminated for reasons unrelated to her FMLA request. It cites to the Notice and Final Dismissal Letters as demonstrating alternative non-FMLA related grounds for terminating Plaintiff's employment. *See* Notice Letter; Final Dismissal Letter. These letters refer not only to Plaintiff's status as AWOL between December 23, 2002 and January 1, 2003 as the reason for its decision, but also her "detrimental and disruptive" behavior and her failure to perform her duties. In the Merit System Board's dismissal of her appeal, the Board referred to her refusal to return on December 23, 2002 as "insubordination." Although it is true that these letters refer to reasons other than her AWOL status as a basis for terminating Plaintiff, all of these reasons are inextricably intertwined with her request for FMLA leave, the denial of which resulted in Plaintiff's termination. Indeed, after Ms. Barney chronicled the events surrounding Plaintiff's initial request for 3-weeks leave, and her subsequent request for an extension, she explicitly stated that if she found Plaintiff's response to the Notice Letter satisfactory, including her explanation as to how the latter request may qualify under the FMLA, Plaintiff would not be dismissed. *See* Notice Letter at 5. Moreover, in the Final Dismissal Letter, Ms. Barney stated that "after carefully consider[ing] the record on this matter," including "whether [Plaintiff's] Grandmother's unfortunate health situation qualifies for consideration under the FMLA," she could find no reason justifying changing her termination decision. *See* Final Dismissal

Letter. With respect to the FMLA decision, Ms. Barney stated that although she had every reason to believe Plaintiff was close to her grandmother, "this is simply not the sort of relationship covered under the law." *Id.* In light of Ms. Barney's statements in these two letters, particularly that Plaintiff would not be dismissed if she found her response to the Notice Letter satisfactory, Defendant's assertion that a "meritorious FMLA entitlement could change the outcome on the absent-without-leave component, [but] the insubordination basis [would be] unaffected" is tenuous at best. As Plaintiff correctly notes in her brief "Defendant's subsequent termination of her for allegedly being insubordinate in taking the extended leave either stands or falls on whether it was FMLA qualifying leave." Paper 18 at 16. Accordingly, Defendant's motion for summary judgment on the grounds that Plaintiff was terminated for reasons unrelated to her FMLA request is denied.

E. Whether Plaintiff is entitled to liquidated damages

Finally, Defendant moves for partial summary judgment on Plaintiff's request for liquidated damages, arguing that even if material factual disputes preclude summary judgment on the other issues, liquidated damages are not appropriate in this case. "A plaintiff who makes out a successful claim under the FMLA is generally entitled to an award of liquidated damages, which is an amount equal to the amount of back pay plus interest at the prevailing rate." *Miller v. AT & T*, 83 F.Supp.2d 700, 709 (S.D.W.Va. 2000) (*Miller II*) (citing 29 U.S.C. § 2617 (a) (1) (A) (iii)) . The court, in its discretion, can reduce or eliminate the amount of

liquidated damages if the employer proves that it acted in good faith and had reasonable grounds for taking the action that constituted the violation of the FMLA. *Id.* The defendant bears the burden of proving that it acted in good faith and upon reasonable grounds. *Cf. Roy v. County of Lexington, South Carolina*, 141 F.3d 533, 548 (4th Cir. 1998); *Mayhew v. Wells*, 125 F.3d 216, 221 (4th Cir. 1997).

Here, it remains disputed whether Plaintiff qualified for leave under the FMLA. Even if she did, however, the record demonstrates unequivocally that Defendant acted in good faith and had reasonable grounds for believing that its actions were proper. It is undisputed that Defendant not only considered the possibility that Plaintiff's request may have been covered under the FMLA, but it gave Plaintiff repeated opportunities to clarify her relationship with her grandmother in order to demonstrate her entitlement to it. In fact, it was Defendant, not Plaintiff, who first explicitly mentioned the possibility that Plaintiff's absence may be covered under the FMLA and provided to her the necessary forms to submit. Indeed, Defendant bent over backwards to give Plaintiff's leave request every consideration despite its right to be skeptical given Plaintiff's assertion in November 2002 that she would take three-weeks leave whether approved or not.

Plaintiff points to language in the Final Dismissal Letter to support her request for liquidated damages. In that letter, Ms. Barney states that an exception to the general rule that the FMLA does not cover leave to take care of grandparents is where "a grandparent is recognized legally as the employee's parent." *See* Final

Dismissal Letter. Plaintiff argues that this statement demonstrates that Defendant was not acting in good faith because it was holding her to a more stringent standard for establishing an "in loco parentis" relationship than provided for in the relevant Labor regulations. As discussed above, § 825.113 (c) (3) provides that a "biological or legal relationship is not necessary." Although Ms. Barney did write that the exception exists where the grandparent is "recognized legally as the employee's parent," Plaintiff is reading entirely too much into this lone statement. Defendant was not seeking to hold Plaintiff to a higher or more demanding standard than required by the language of FMLA or the relevant regulations, and plainly did not require Plaintiff to provide a court order designating her grandmother as her legal guardian. As Defendant made abundantly clear when it provided Plaintiff the FMLA forms, it was merely asking Plaintiff to "explain in reasonable detail whether, and, if so, when and how [Plaintiff's] grandmother actually stood in the role of [her] parent during childhood." See Notice Letter at 5 (emphasis added). Moreover, Ms. Barney attests in her affidavit that the purpose of her meeting with Plaintiff on January 10, 2003, prior to Plaintiff's termination, was, in part, to seek addition information from her "generally to determine if her grandmother 'stood in the place of' her parents so as to be a legally recognized relationship under the FMLA." Barney Aff., ¶24. Although its conclusion regarding Plaintiff's entitlement to FMLA leave may ultimately prove erroneous, the record as a whole demonstrates a pattern of good faith inquiry and consideration regarding Plaintiff's asserted entitlement to FMLA leave. Accordingly, Defendant has met its burden of demonstrating that it "acted in good faith and had

reasonable grounds for believing that the FMLA did not apply to [Plaintiff's] absences. Having found that [Defendant] has met its burden of proof, the Court finds that liquidated damages are not appropriate in this case." *Miller II*, 83 F.Supp.2d at 709. Accordingly, Defendant's motion with respect to the issue of liquidated damages will be granted.

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment will be denied, and Defendant's motion for summary judgment will be denied in part and granted in part. A separate Order will follow.

/s/ _____
DEBORAH K. CHASANOW
United States District Judge
August 18, 2005

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed January 15, 2008]

No. 06-2221 (L)
(8:04-cv-00994)

CYNTHIA DILLON,	)
Plaintiff - Appellee,	)
	)
v.	)
	)
MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,	)
Defendant - Appellant.	)
	)

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer, Judge Michael, and Judge Traxler.

For the Court

/s/_____
Patricia S. Connor, Clerk

APPENDIX I

United States Code
Title 29. Labor
Chapter 28. Family and Medical Leave

29 U.S.C. § 2601. Findings and purposes

(a) Findings

Congress finds that--

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for

family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act--

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including

maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include--

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions,

regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means--

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours

per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves--

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is--

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

(14) Active duty

The term "active duty" means duty under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of Title 10.

(15) Contingency operation

The term "contingency operation" has the same meaning given such term in section 101(a)(13) of Title 10.

(16) Covered servicemember

The term "covered servicemember" means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

(17) Outpatient status

The term "outpatient status", with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to--

(A) a military medical treatment facility as an outpatient; or

(B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(18) Next of kin

The term "next of kin", used with respect to an individual, means the nearest blood relative of that individual.

(19) Serious injury or illness

The term "serious injury or illness", in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

29 U.S.C. § 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Servicemember family leave

Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined leave total

During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

* * *

29 U.S.C. § 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of paragraph (1) or paragraph (3) of section 2612(a) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual in the case of leave taken under such paragraph (3), as appropriate. The

employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states--

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

(f) Certification related to active duty or call to active duty

An employer may require that a request for leave under section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer.

29 U.S.C. § 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a

case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action

The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action

The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.

(3) Sums recovered

Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general

Except as provided in paragraph (2), an action may be brought under this section not later than 2 years

after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation

In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement

In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary--

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) Government Accountability Office and Library of Congress

In the case of the Government Accountability Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter V. Wage and Hour Division, Department of Labor
Subchapter C. Other Laws
Part 825. The Family and Medical Leave Act of 1993

29 C.F.R. § 825.208 Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the

circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying

the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave--consistent with the employer's established policy or practice--and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the

designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the

employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

29 C.F.R. § 825.301 What other notices to employees are required of employers under the FMLA?

(a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(2) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b)(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see § 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§ 825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The specific notice may include other information-- e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee--within one or two business days if feasible. If leave has already begun,

the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-months period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not

required, at least oral notice shall be provided. (See § 825.305(a).)

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

29 C.F.R. § 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement

for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see § 825.305).

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave

schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (see § 825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

29 C.F.R. § 825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or

two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

29 C.F.R. § 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a

certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a

certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

29 C.F.R. § 825.307 What may an employer do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also paragraphs (e) and (f) of this section.

(b) The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be fmal and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select

for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

(d) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third

opinions from a health care provider who practices in that country.

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No. 07-1300

FILED

MAY 16 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

CYNTHIA DILLON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF ISSUES

Whether the Court should grant the Petition hereon to resolve the following questions:

1. Whether a reasonable jury was compelled to find that Dillon deliberately withheld from the Commission the fact that her mother was sixteen when she gave birth to her and whether the Commission was also "entitled" to that same information as a matter of law under the notice provision of the FMLA despite having been provided adequate notice that Dillon had an *in loco parentis* relationship to her grandmother and despite the Commission's never even having discussed the issue with Dillon?

2. Whether the trial court's admission of evidence beyond merely Dillon's pre-termination statements to the Commission to establish Dillon's qualification for FMLA leave was an abuse of discretion where the trial court gave an extremely restrictive limiting instruction as to the jury's use of the evidence?

3. Whether Dillon's grandmother's doctor's mistaken notation on the FMLA application form compelled the jury to find that Dillon deliberately lied about the reasons for her need for FMLA leave as a matter of law?

4. Whether the trial court erred in giving the "needed to care" jury instruction when there was evidence that Dillon provided to her employer prior to the termination several reasons that she was "needed to care" for her grandmother that were contained in the jury instruction?

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INTRODUCTION

It was not without good reason that the Fourth Circuit issued a brief *per curiam* opinion in this case and deemed the Commission's appeal from the jury verdict not worthy of oral argument before a three-judge panel, let alone rehearing *en banc*. Put simply, the Commission's arguments before the Fourth Circuit and now for granting certiorari in this case largely boil down to its disagreements with the jury's resolution of factual disputes.

In desperation the Commission misrepresents the Fourth Circuit's holding in this case in a weak attempt to argue there is a split in the circuits. The Commission alleges that the Fourth Circuit in this case held it liable for "interfering with an employee's FMLA rights [even though] the employee deliberately withh[eld] from the employer or deliberately misle[d] the employer about the reasons leave [wa]s needed in the first place." Pet. at 26-27. As evidence of the split, the Commission then cites an Eleventh Circuit case holding that the employee cannot qualify for FMLA leave if she provides false information to the employer at the time the decision is made. Gay v. Gilman Paper Company, 125 F.3d 1432 (11th Cir. 1997). Unfortunately for the Commission, its representation as to the Fourth Circuit's holding in this case bears no resemblance to reality since there was no evidence that Dillon "deliberately withheld" or "deliberately misled" the Commission in asserting her reasons for needing FMLA leave in this case nor was a reasonable jury was compelled to find that she had deliberately misled the Commission or deliberately withheld

information from them. Therefore, there is simply no split in the circuits on this "issue"; it is purely manufactured by the Commission.

The background facts here are straight forward. The Commission denied Dillon FMLA leave and terminated her because it incorrectly insisted that Dillon's grandmother had to have been "recognized legally as [Dillon's] parent" in order for Dillon to qualify for FMLA leave to care for her. Pet. at 139a. (Petitioner even requested documents from respondent to show that respondent's grandmother had legally adopted her.) The Commission later raised many additional objections to her qualification for FMLA leave during the litigation which it did not raise at the time it denied Dillon FMLA leave, and then it objected when Dillon attempted to introduce evidence to counter those new objections, claiming that Dillon had never shown it such rebuttal evidence before the termination. However, again, at the time of the termination the Commission's focus was on whether Dillon's grandmother was "legally recognized" as her parent and whether the grandmother adopted her.

The Commission now makes, essentially, four specific arguments supporting its misrepresentation of the Fourth Circuit's holding described above, all of which are without merit. First, the Commission argues that a reasonable jury was required to find as a matter of law that Dillon deliberately withheld the fact that her mother wa sixteen at the time she gave birth to her (which related to the issue of whether Dillon's grandmother was *in loco parentis* to Dillon during Dillon's childhood) and that it had an

"entitlement" to such information before terminating her. However the issue of Dillon's mother's age never came up in the pre-termination discussions between Dillon and the Commission. Thus, there is no evidence that Dillon deliberately withheld such information and, indeed, the Commission was told twice by Dillon that her grandmother "actually raised" her, providing it sufficient notice of the nature of Dillon's relationship with her grandmother. The Commission's argument would also make the statute's notice provision impossibly burdensome since it would require an employee to provide not just sufficient facts to invoke the FMLA but every possible fact that might relate to the decision to grant FMLA leave.

Second, the Commission argues that, contrary to the Fourth Circuit's holding, Dillon could only present as evidence of FMLA qualification in this case statements she made to the Commission prior to her termination, even though prior to the termination the Commission only objected because Dillon's grandmother was not "recognized legally" as her parent. However, the trial court and Fourth Circuit correctly held that Dillon could use more than her pre-termination statements to establish she was in fact qualified for leave under the FMLA as long as there was an instruction limiting the jury's use of such evidence to this issue.

Third, the Commission argues that a reasonable jury was compelled as a matter of law to find that her grandmother's doctor's mistaken notation on Dillon's FMLA leave request demonstrated that Dillon deliberately lied to the

Commission about her reasons for needing leave. Again, no such conclusion was compelled given the record evidence in the case.

Finally, the Commission argues that the "needed to care for" jury instruction given by the trial court allowed Dillon to argue that she was "needed to care for" her grandmother for reasons she never communicated to the Commission at the time of the decision denying her FMLA leave: *viz.*,to relieve the regular care giver and to find better overall healthcare arrangements for her grandmother who had just suffered a stroke and was living in a place without even indoor plumbing or running water. However, the Commission never objected prior to its decision to deny her FMLA leave that she was not needed to care for her grandmother. It only raised this objection later during the litigation–therefore, Dillon was entitled to refute this objection with whatever evidence she had. Additionally, there was record evidence that Dillon did communicate these reasons to the Commission prior to the decision denying her FMLA leave; indeed it was undisputed that she had asserted at least one of the reasons.

STATEMENT

I. Petitioner's Argument that this Court Should Grant Certiorari Because Respondent did not Disclose Her Mother was Sixteen When she Gave Birth to Her is Completely Without Merit.

Under the FMLA an employee may take leave to care for a "parent" with a "serious health condition". 29 U.S.C. § 2612(1)(c). The definition of a "parent" for purposes of the FMLA includes "a biological parent or any individual who stood *in loco parentis* to an employee when the employee was a son or a daughter." 29 U.S.C. § 2611(7); 29 C.F.R. § 825.113(b). A "son or a daughter" is a "legal ward or the child of a person standing *in loco parentis*, who is under age 18 or age 18." 29 U.S.C. § 2611(12); 29 C.F.R. § 825.113(c)(3). Persons who are *in loco parentis* to an employee include those individuals who had "day-to-day responsibilities" to care for and "financially support" the employee when she was a child. 29 C.F.R. § 825.113(c)(3). A "biological or a legal relationship is not necessary" between the employee and the person who stood in loco parentis for a person to be considered an employee's parent under the FMLA. *Id.* "The term '*in loco parentis*,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." Niewiadomski v. United States, 159 F.2d 683, 686

(6th Cir. 1947). *Black's Law Dictionary* defines the phrase "in loco parentis" as "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." *Black's Law Dictionary* p. 787 (6th ed. 1990).

The notice provisions of the FMLA merely require that the employee indicate leave is needed, the reason for the leave, and provide information responding to whatever reasonable questions the employer has about the leave. See 29 C.F.R. § 825.302(c); Thorson v. Gemini, Inc., 205 F.3d 370, 381 (8th Cir. 2000) ("Under the FMLA, an employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave").

In the instant case in addition to telling the Commission of her need for leave to care for her grandmother who had just suffered a stroke, Dillon told the Commission on two occasions prior to its denying her FMLA leave that her grandmother had "actually raised" her as a child, clearly putting the Commission on notice of the *in loco parentis* type of relationship described above which qualified Dillon for FMLA leave. Nevertheless, the Commission argues that because Dillon did not also indicate at the time of the decision to deny her FMLA leave all possible salient facts–in this case that her birth mother was sixteen when she gave birth to her (which never came up in the discussions between Dillon and the Commission)–somehow that means that Dillon was deliberately withholding this information it was "entitled" to have as a matter of

law. However, the Commission points to no evidence that Dillon deliberately withheld that or any other information or that it even inquired about the age of Dillon's mother. Indeed the Commission's argument simply amounts to a disagreement with the jury's apparent conclusion on this factual issue. As to the argument that the Commission was "entitled" to this fact as a matter of law (an argument never previously raised by the Commission), one need only point to the trial court's holding that the Commission had sufficient notice at the time of the termination that during a period of Dillon's childhood Dillon's grandmother stood *in loco parentis* to Dillon, including as described above that her grandmother "actually raised" her. Sherrod v. Philadelphia Glass Works, 57 Fed. Appx. 68 (3d Cir. 2003) (employer had no obligation to grant leave once the plaintiff made clear to the employer that her grandmother "raised her"). The trial court cited to the following evidence in the record:

> Ms. Dillon's January 4, 2003 letter reveals that her grandmother, in essence, had day-to-day responsibilities. Ms. Dillon notes her mother was around, but she discloses she was always with her grandmother. Ms. Dillon describes her grandmother as being instrumental in her life and playing a major role in her upbringing. A reasonable jury could infer that Ms. Dillon was very dependent as a child upon her grandmother.

Pet. at 27a.

Thus, the Commission's argument would mean that the notice requirement of the statute would dictate that an employee must provide each and every possible relevant fact and argument supporting her qualification for leave at the time the request is made by the employee, even where the information the employee did provide was more than sufficient to put the employer on notice that FMLA was needed, where the specific factual issue was never raised, and where she has answered all questions raised by the employer. While the Commission claims the Fourth Circuit held it to an impossible standard, it is really the Commission which seeks to hold employees to an impossible standard not supported by the statute or the regulations. Here it is clear that Dillon responded truthfully and completely to all questions presented to her by petitioner, which were mainly directed to whether she had evidence that she was legally adopted.

II. The Trial Court and the Fourth Circuit Correctly Held that Dillon was not Limited to Simply her Statements to the Commission prior to her Termination to Show that She was in fact Qualified for FMLA Leave.

The Commission also argues that the jury should have only been allowed to consider pre-termination statements Dillon made to the Commission not just on the issue of notice but as to all aspect of her qualification for FMLA leave, and even though the Commission raised myriad new

objections to her qualification for FMLA at trial never raised at the time of the decision to deny her FMLA leave. In response to this argument below the trial court held correctly held:

> [P]ost-termination evidence is relevant to whether Ms. Dillon was qualified to take FMLA leave to care for her grandmother at the time the Commission fired Ms. Dillon.... Both parties acknowledge Ms. Dillon bears the burden of proving her grandmother had a serious health condition, that Ms. Dillon was needed to care for her grandmother within the meaning of the FMLA and that Ms. Dillon was entitled to coverage under the FMLA.

Pet. at 100a.

Indeed the court went on to give a limiting instruction that was far more restrictive of the jury's use of the evidence than the law required (and therefore far more favorable to the Commission):

> Information that was not provided to the defendant by the plaintiff and her grandmother's doctor prior to January 17, 2003, the date of the termination, may not be considered on the issue of whether the employer interfered with any FMLA rights the plaintiff may have had by earlier terminating her employment.

Trial Tr. at 136 (March 22, 2006).

The jury could have readily believed that as a result of this instruction that it was not allowed to consider post-termination evidence at all. Nevertheless, the Commission argues that the trial court abused its discretion by admitting any "post-termination" evidence for any purpose, even with the limiting instruction. The Commission is incorrect on both counts.

First, as indicated above, the evidence the Commission objects to was admitted to show Dillon was in fact qualified for FMLA and in many cases to refute objections not raised by the Commission until the litigation. Second, even if the trial court erred in allowing the jury to hear the evidence, it was more than cured by the court's extremely restrictive instruction to the jury. Finally, the Commission does not show that it was in any way harmed by the admission of the evidence other than this generalized assertion of prejudice.

III. This Court Should Not Grant Certiorari Based on a Mistaken Doctor's Notation on The FMLA Request Form.

The Commission also makes much ado about the doctor's notation on the FMLA certification indicating "Cynthia Dillon (granddaughter) came and looked after her and found B. Ellis to look after her." Pet. at 19. The Commission insinuates that Dillon lied to the doctor about finding Ms. Ellis since Ellis was Dillon's grandmother's daughter and primary care-taker all along. However, this argument is simply a quarrel with the jury's

apparent factual findings, which is not a basis for granting certiorari. Moreover, the Commission's preferred factual finding is not even supported by the record. Dillon never told the Commission that she was needed to care for her grandmother so that she could find a full-time caretaker. Her concern was (as she explained to the Commission at the time) finding better living arrangements for her grandmother after the stroke as well as providing physical care for her grandmother during the critical two to three week period after the stroke. Pet. at 19a, 84a. The trial court correctly held that the jury could have easily found that the doctor simply misunderstood the situation and believed that B. Ellis was the found caretaker since the doctor had never seen B. Ellis before. Indeed, it would have made no sense for Dillon to mislead the doctor by claiming she was seeking a caretaker since Dillon repeatedly told the Commission that she needed the time in order to "find a home" for her grandmother and because she was taking care of her grandmother. Pet. at 19a, 84a. But the bottom line here is that there is a factual dispute that was for the jury to decide. While the Commission wishes the jury found that Dillon deliberately withheld information from the Commission, the jury was not required to so find.

IV. This Court Should not Grant Certiorari Based on the Argument that the Trial Court Improperly Instructed the Jury on the "Needed to Care for" Element of Proof.

The Commission objects because the trial court gave the following "needed to care for"

instruction to the jury: "The phrase ['needed to care for'] also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such a transfer to a nursing home." Pet. at 83a. The Commission argues that the jury instruction allowed Dillon to argue she was "needed for care" for her grandmother in order to find better care arrangements for her grandmother after the stroke and in order to fill in for others even though she did not explicitly assert these reasons to the Commission prior to the termination. The Commission's argument is without merit for several reasons.

First, the Commission never objected at all at the time of the termination that she was not needed to care for her grandmother or that she did not need to make changes in care for her grandmother–it only argued that her grandmother was not legally recognized as her parent under the FMLA. So there was no reason Dillon should be limited to her post-termination statement as the Commission argues. Second, even if Dillon were limited to pre-termination statements, there was evidence in the record that Dillon did assert to the Commission prior to her termination that she was needed to care for her grandmother in order to change care and in order to relieve a care giver. As the trial court held, it "is undisputed that in her e-mails to Ms. Barney prior to January 17, 2003, Ms. Dillon sought an extension because her grandmother was ill and Ms. Dillon needed to find a better place for her grandmother to live." Pet. at 83a-84a. Dillon also indicated in an email that she needed to physically

care for her grandmother as well. ("I have been taking care of her ever since I got here." Pet. at 19a.) She had to physically care for her grandmother in order to relieve the normal care giver. She did not specifically indicate it was "in relief of a care giver" at the time of the FMLA leave denial but only because the Commission never explored the issue with her–again, the Commission was only focused on the relationship with her grandmother. In any event, as the trial court correctly held, whether or not Dillon indicated that she was needed to relieve a care giver explicitly enough, any error in instructing the jury here was harmless since there was no dispute that she asserted she needed to find a change in care and "defendant has presented no evidence showing the jury relied on the first clause [relief of a care giver], [versus] the second clause [change in care] in determining Ms. Dillon's FMLA entitlement." Pet at 84a.

REASONS FOR DENYING THE PETITION

As shown above there is simply no split in the circuits which this court needs to resolve. In reality the Commission still cannot accept the jury's resolution in this case of garden-variety factual disputes and the inferences to be drawn from the record. But that is simply no basis for this Court to grant certiorari.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

FOR THE RESPONDENT

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